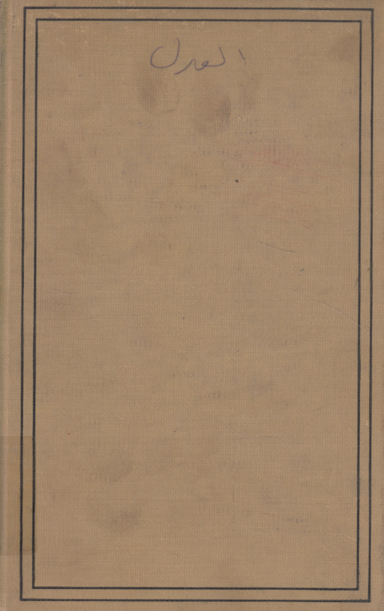








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

JULY 1, 1942, TO JANUARY 31, 1943

WITH

REPORT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

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[1] On military leave, as of November 2, 1942; lieutenant commander, U. S. Naval Reserves, on active duty.

[2] On military leave, as of October 20, 1942; major, U. S. Army, on active duty.



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CASES DECIDED

IN

THE COURT OF CLAIMS

July 1, 1942, to January 31, 1943

FRAZIER-DAVIS CONSTRUCTION CO v. THE UNITED STATES

[No. 43502. Decided May 4, 1942. Plaintiff's motion for new trial overruled, October 5, 1942]

On the Proofs

Government contract; change order; acceptance evidenced by acceptance of voucher and check.—Where plaintiff entered into a contract, January 19, 1933, for the construction of Lock and Dam No. 5, Green River, Kentucky; and where during the progress of the work subsurface conditions materially different from conditions shown on the drawings and indicated in the specifications were encountered; and where thereby additional expense was incurred by plaintiff; and where upon calling such different conditions to the attention of the contracting officer on May 1, 1933, a change order was issued, approved by the Chief of Engineers and the Secretary of War, granting an increase in the price for excavating and granting also an extension of time; and where the plaintiff, without indicating acceptance or rejection of said change order, executed without protest a voucher for excavation between May 1, 1933, and October 31, 1933, at the price set forth in said change order, and subsequently also accepted without protest and cashed the check represented by said voucher, and likewise accepted other such vouchers and checks, and in a letter to the contracting officer admitted it had accepted said change order; *it is held* that such change order constituted a modification of the contract and that, as so modified, it had been fully performed by the defendant, and that, therefore, plaintiff is not entitled to recover.

Same; No recovery for extra where more has been paid than contract price plus cost of extra.—Where during the construction of the Lock and Dam No. 5, Green River, Kentucky, for which plaintiff was the contractor, the bank of the excavation caved in, requiring the removal of the caved-in material by plaintiff; and where, upon appeal to the Secretary of War from the contracting officer's decision denying to plaintiff payment for said removal, the Chief of Engineers and the Secretary of War reconsidered the entire case, not only whether plaintiff should be paid for removing the caved-in material but also whether or not the change order previously issued was in fact an equitable adjustment; and where upon such reconsideration it was concluded that plaintiff was entitled to increased compensation in excess of the amount claimed for removal of the caved-in material, and this amount has been paid it; it is *held* that plaintiff is not entitled to recover.

Same.—In all the circumstances, the defendant's representatives not only acted generously with the plaintiff, but were fair to the defendant's interests.

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiff.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Rawlings Ragland* was on the brief.

The court made special findings of fact as follows:

1. Frazier-Davis Construction Company is a Missouri corporation with its principal office in St. Louis. January 19, 1933 it contracted with the United States, through the War Department, for the construction of Lock and Dam No. 5, Green River, Kentucky, for the consideration of the estimated sum of $680,216.05, based on the unit prices listed on the schedule attached to the contract for the various units of work to be performed and materials to be furnished. The contract, with the accompanying specifications, is of record as plaintiff's exhibit 1, and is made a part hereof by reference.

Plaintiff agreed to furnish the labor and material and perform the work in strict accordance with the specifications and schedule of unit prices attached to the contract and according to the drawings designated in paragraph 4 of the specifications attached thereto.

2. Originally the unit price of 15 cents per cubic yard was agreed upon for removing all "common excavation," which was estimated to be 217,600 cubic yards. Specification 1–05 (b) reads:

(b) *Classification.*—Excavation will be classed either as common excavation or rock excavation. Common excavation shall include all materials which may be removed without blasting, by hand, power shovel, clamshell buckets or dredge. All materials requiring drilling and blasting for their removal shall be classed as rock excavation. Boulders or loose rocks exceeding 9 cubic feet in volume will be classed as rock excavation.

3. The original amount of excavation involved for the lock, guide walls and dam as given by the bid sheet was 217,600 cubic yards. The original bid sheet provided for 47,500 cubic yards of refill, furnishing and driving 105,000 linear feet of wood piling, furnishing and driving 56,400 square feet of permanent sheet piling, furnishing in place 49,200 cubic yards of concrete, and furnishing, erecting, and painting 1,125,000 pounds of structural steel castings and miscellaneous metal work. The work consisted of building a new lock and dam, which work was to be done inside of three cofferdams, the lock and guide walls were to be built inside one cofferdam, and each of two sections of the dam was to be built in each of two additional cofferdams. The work to be done inside the cofferdam inclosing the lock and guide walls also embraced the driving of wood piling and permanent sheet piling, furnishing concrete, and furnishing, erecting and painting steel miter gates.

4. Section 1 of the specifications contained the following:

1–01. *General.*—From investigations, including surveys, soundings and borings made at the site, it is assumed that conditions are approximately as indicated on the drawings, but the nature of the materials, the depth to satisfactory foundations, and the stability of the river bed or banks, are not guaranteed.

1–05. *Excavation.*—(a) *Character of Materials.*—The borings shown on sheet 10/1 represent the character of the required excavation and the materials on which the structure will be founded. The cores are stored at the United States Engineer Office, Louisville, Ky. They represent all the sub-surface explorations which

the United States has made at the site. It is believed that they represent the average conditions that will be encountered, and they are considered adequate to serve as a basis for bidders to estimate the cost of performing the work. In the event, however, that materials, structures or obstacles of a materially different character are encountered during the progress of the work, and the cost of their removal or satisfactory treatment obviously would be, in the opinion of the contracting officer, either in excess of, or less than the contract unit price, the contracting officer, in either alternative, will then proceed in accordance with the provisions of Article 4 of the contract or any authorized revision thereof. To make possible the prompt administration of this provision, in so far as the rock foundation is concerned, the contractor will proceed with the drilling of test holes well in advance of excavating operations. The log of the test holes will be recorded by the inspectors. On the basis of the information thus obtained, the contracting officer will, as promptly as possible in order to permit the uninterrupted progress of excavating equipment, indicate to the contractor the approximate depths and widths to which the excavation shall be carried to secure satisfactory foundations. Immediately after a decision is rendered for any particular section of the foundation, the contractor and the contracting officer shall each determine whether conditions have been encountered that differ materially from those that could reasonably have been anticipated prior to beginning construction, and, if such be the case, shall promptly proceed in accordance with the provisions of Article 4, and if necessary, the provisions of Article 15 of the contract.

5. The specifications provided that the contractor should visit the site and acquaint himself with the nature of the materials to be encountered; that samples of borings taken at the lock site were on hand at the United States Engineer's office at Louisville, Kentucky, where they should be inspected by prospective bidders; that it was expected that bidders would visit the site and acquaint themselves "with all valuable information concerning the nature of the materials that will be encountered in the river bed," the depth to which it might be necessary to excavate or to drive piling in order to secure satisfactory foundations, the possibility that the river bed or banks would change from natural causes prior

to and after commencement of the work, and that "failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of assuming all responsibility for estimating the difficulties and costs of successfully performing the complete work as required."

The original borings made by defendant at the site of the work were wash borings, which disclosed in a general way the nature of the materials to be encountered, but did not reflect their density or other characteristics as completely as core borings might have reflected. These original wash borings indicated that the materials to be encountered would be loam, loam and clay, sand and clay, sand and some rock. They indicated that the clay content might average 33 percent of the materials to be encountered. There were a great many borings indicated on the drawings, but of all the borings so indicated there were only eight, Nos. 25 to 28, inclusive, 30, and 77 to 79, inclusive, which were taken on or immediately adjacent to the site of the work. Plaintiff in examining the borings presumed that all of the balance of the borings had been taken prior to the location of the site in order to determine its proper location, and that the final location of the work to be performed was made over the area of the eight borings above mentioned. Certain core borings were also available and shown, but these core borings had been taken about 1,000 feet below the immediate site definitely selected for the work to be performed. These core borings showed loam at the surface and blue clay below.

6. The contract provided:

> ARTICLE 3. *Changes*.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head

of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

* * * * *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

7. A representative of plaintiff went to Louisville, Kentucky, and examined the borings referred to in paragraph 1–05 of the specifications and in sheet 10/1, one of the contract drawings. He also visited the site of the work. He concluded that the borings and information on exhibition showed loam and sand which he believed could be readily dredged by a suction dredge without cutter head and spuds.

Shortly after the bids were opened a representative of de-

fendant inspected plaintiff's plant at St. Louis, Missouri. At that time plaintiff did not own or have in its possession a suction dredge, which it intended to use on this job. January 10, 1933, plaintiff wrote the defendant in part as follows:

> We actually own outright all of the equipment, except the floating equipment, for doing this work; such as cranes, steam hammers, mixers, pumps, compressors, boilers, engines, trucks, etc., and contemplate the purchasing or leasing of a dredge, two derrick boats, one tow boat and the necessary barges. We have an infinite amount of this floating plant offered to us at extremely low prices and we are enclosing options on a great quantity of the equipment mentioned above, these options giving us time to purchase after the award of the contract. We feel in a way that this is much better than actually owning this floating equipment as by purchasing it or leasing it we can get such equipment as will actually fit the needs of this job instead of using some equipment which we might have on hand and which would not specifically fit the work involved. In this connection, we will, of course, submit to the Government for their approval the equipment which we anticipate purchasing or leasing before actually contracting therefor.

A 10″ suction dredge was brought to the site after the work had begun. Plaintiff had several conferences with the contracting officer, Colonel Johnson, and other members of defendant's engineering force prior to award of the contract with reference to the plaintiff's plant to be used for the excavation work. In these conferences and also in its plant layout submitted with its bid plaintiff outlined the equipment that it proposed to use. This equipment consisted of one 10″ suction dredge, two derrick boats, three cranes, one floating pile driver, four steel barges, and one concrete mixing plant. No objection was made to the proposed equipment by the contracting officer. The rate of progress plaintiff showed on its progress chart submitted with its bid was based on the use of this equipment. The contracting officer did not, prior to the making of the contract, see the dredge nor approve the equipment which the contractor intended to use, although he satisfied himself that the contractor was qualified to do the work.

Paragraph 15 of the General Specifications provided:

Organization, Plant, and Progress.—(a) The contractor shall employ an ample force of men and provide construction plant properly adapted to the work and of sufficient capacity and efficiency to accomplish the work in a safe and workmanlike manner at the rate of progress specified in his bid. All plant shall be maintained in good working order and provision shall be made for immediate emergency repairs. No change in the plant employed on the work, which would have the effect of decreasing its capacity below the capacity of the plant named in the bid, shall be made except by written permission of the contracting officer. The measure of "capacity of the plant" shall be its actual performance on the work to which these specifications apply. It is understood that award of this contract shall not be construed as a guaranty by the United States that plant listed in statement of contractor for use on this contract is adequate for the performance of the work.

(b) Should the contractor fail to maintain the rate of progress which he proposes in his bid, the contracting officer may require that additional men and/or plant be placed on the work, or a reorganization of plant layout be effected in order that the work be brought up to schedule and maintained there. Should the contractor refuse or neglect to so increase the number of men and/or plant, or reorganize the plant layout in the manner satisfactory to the contracting officer, the latter may proceed under the provisions of Article 9 of the contract.

8. It was provided in the invitation for bids that the bidder should submit a progress schedule and plant layout for the information of the contracting officer. In compliance therewith plaintiff submitted with its bid a progress schedule and a plant layout, to which were attached explanatory remarks. The progress schedule showed the time for starting operations on the work and the time for completion of certain portions of the work within the lock. It showed all pile driving for the lock, and that the excavation for the lock and both guide walls was to be completed by June 6, 1933, which actually was not completed until February 1, 1934. It showed that the concrete for the lock and guide walls was to be completed by October 1, 1933, which actually was not completed until April 7, 1934, and it showed that the

installation of the miter gates was to be completed by October 1, 1933, which actually was completed on January 19, 1934.

9. February 6, 1933, plaintiff received notice to proceed. Soon thereafter plaintiff's superintendent, together with his assistants, inspected the site and began operations preliminary to clearing it. February 12, 1933, plaintiff delivered at the site a 10″ suction dredge, together with other miscellaneous equipment. This dredge was not equipped with high velocity water jets, a cutter head or spuds. It was of a type designed and generally used for dredging sand and gravel. Before dredging work was actually commenced the question whether this dredging equipment was adequate was the subject of several conferences between representatives of plaintiff and defendant. At the conclusion of these conferences defendant's contracting officer was of the opinion that a 10″ suction dredge was not adequate or proper but that plaintiff could be depended on to obtain additional and larger dredges and other equipment required to do the work in a satisfactory manner. Nothing was said at this time with reference to the character of materials being encountered.

10. Dredging actually began February 26, 1933. The time intervening since the arrival of the 10″ suction dredge on February 12, 1933 was consumed in clearing the site of stumps and trees and placing the discharge pipe line and the dredge suction pipe. The dredge was comparatively new, with a capacity in material suitable to be handled by that type of dredge of about 2,500 cubic yards per 24-hour day. It was of the type designed and generally used for the removal of sand and gravel. It was questionable whether or not it was adequate or suitable for successfully dredging the kind and character of material described in the specifications. Plaintiff also used a 50–B dragline machine, equipped with a 75′ boom and 1½-yard dragline clamshell bucket, with a capacity of 1,500 cubic yards of sand and gravel per 24-hour day. It was the plan of plaintiff to store this dredged material along the river bank and later use it as refill behind the lock wall. The contract provided for a price of 35 cents per cubic yard for refill.

As long as plaintiff operated the suction pipe of its dredge slightly below the water bottom level the 10″ dredge and suction pipe performed fairly well, handling about 25 percent of solids composed of loam and sand, but no clay, but as soon as plaintiff proceeded deeper into the river bed and lowered the suction dredge pipe, it picked up very little material and practically no solids. March 3, 1933, plaintiff placed another pump on the dredge. This pump agitated the material at the end of the suction pipe, which still failed to pump any substantial amount of solids. Plaintiff operated the dredge for 13 days beginning February 26, 1933, but made no progress except just below the bottom of the water line.

Plaintiff had calculated on doing all the excavation for the lock and upper and lower guide walls with this 10″ suction dredge, except such excavation as would be necessary for refill, which was to be done with a dragline and prior to the completion of the cofferdam for the lock and guide walls.

11. Time was lost in making repairs and installing a new pump and booster materials on the dredge. Plaintiff admitted March 13, 1933 that the 10″ dredge had made but little progress, and on that date it discontinued its use because it was not able to make any substantial progress with it. It was inadequate for dredging materials of the kind actually encountered. Most of the material removed by plaintiff had been done by the use of a dragline. March 8, 1933, the contracting officer called plaintiff's attention by letter to the fact that during the first month only two percent of the lock yardage had been removed and requested plaintiff to bring its work up to schedule. March 15, 1933, plaintiff replied that its progress had been below its expectation, and that it had sublet all dredging required of it to the Bolz Dredging Company of St. Louis, Missouri. This subcontract fixed a price to the Bolz Dredging Company of 17 cents per cubic yard for common excavation. The Bolz Dredging Company was familiar with the materials disclosed by the borings and as described in the specifications, for the reason that it had submitted its bid for this same dredging work to another bidding contractor for the entire amount before bids were opened by defendant.

The contract between plaintiff and the Bolz Company was dated March 14, 1933, and provided that the Bolz Company would do all the excavation called for in plaintiff's contract with defendant at a price of 17 cents per cubic yard, which it calculated would allow it a profit of three cents per cubic yard. The Bolz Company was experienced in hydraulic dredging. Its contract with plaintiff provided that the terms of the original contract between plaintiff and defendant would be binding in its contract with plaintiff, and it agreed to dredge the materials as specified in the contract between plaintiff and defendant. The Bolz Company, prior to the opening of bids by defendant, had investigated the site and wash borings taken at the site and certain core borings taken by defendant nearby, at Louisville, Kentucky, and its price to plaintiff in the contract of March 14, 1933 was based upon such investigation. The Bolz Company had been engaged in river dredging for many years. It owned a 15″ suction dredge, a 12″ Diesel suction dredge, and a 10″ Diesel suction dredge. The 15″ suction dredge was suitable and adequate without cutter head or spuds for dredging the character of materials as disclosed by the wash borings and described upon the drawings and in the specifications. Plaintiff planned to follow the dredging of the Bolz Company with a floating pile driver in order that the greater part of the pile driving might be finished when the excavation was finished. Plaintiff expected to begin its concrete work about June 1, 1933.

12. March 14, 1933, the Bolz Company loaded on floats at St. Louis, Missouri, a 15″ electric hydraulic dredge and accompanying equipment, which landed at the site of the work March 27, 1933, and immediately began work with this dredge. It was equipped with a system of high velocity water jets, but had no cutter head or spuds. It had a capacity of 5,000 cubic yards a day of material of sand and gravel composition. The contracting officer found that plaintiff had on the job on March 28, 1933, through the Bolz Company, a dredge which he believed was capable of handling the material as it was then believed to be. However, the 15″ electric suction dredge of the Bolz Company failed to operate efficiently in the removal of mate-

rials later encountered in its work as the depth of excavation increased. The Bolz Company soon found operating conditions of its dredge to be similar to those encountered by plaintiff with its 10″ dredge. When it kept the suction pipe just below the water and on the surface of the river bed, a high percentage of solids was pumped, but, when the suction pipe was lowered deeper into the material, mostly clean water was pumped. The reason for this was that the material would not cave in to the mouth of the suction pipe. The Bolz Company operated this dredge from March 28 to April 5, 1933, but failed to remove a reasonable percentage of solids. This dredge ceased operating on April 5, 1933, and plaintiff immediately began installing a cutter head on it. When this was completed on April 16, 1933 the dredge again began operating, with but slight improvement. The material clogged in the cutter head. Further difficulty was encountered and additional time was consumed in effecting repairs. A new engine and a new gear to reduce the load on the motor were installed April 25, 1933. The following day Bolz Company secured a dredging expert who recommended that certain changes be made in the cutter head. All of the teeth were removed, four steel poles were bolted to the blades, and the remainder of the blades were removed. A marked improvement in the operation of the dredge resulted.

13. April 20, 1933, Contracting Officer Johnson visited the site and registered complaint as to plaintiff's slow progress. Mr. Davis, plaintiff's treasurer, explained to Colonel Johnson the difficulty plaintiff had encountered and stated his belief that the material plaintiff was excavating was not strictly of the character as indicated by the wash borings, because of the manner in which it acted with plaintiff's dredges. The 15″ Bolz dredge was operated from March 28 to May 1, 1933, but with disappointing and unsatisfactory results. George Bolz decided that satisfactory progress was not being made and that the cost of operating the suction dredge was exceeding his contract price, and April 28 he bought a 12″ Diesel suction dredge on the site, and May 3 added another 10″ suction dredge. Shortly prior to May 1, and subsequent thereto, plaintiff also used

a dragline for the purpose of assisting the dredges. No investigation had been made or question presented at that time as to whether the material to be removed was of a materially different character from that shown and described in the contract.

14. April 29, 1933, Contracting Officer Johnson wrote plaintiff as follows:

> Confirming our conference of yesterday, April 28, it is desired to call your attention to the continued lack of progress in the reconstruction of Lock and Dam No. 5, Green River.
>
> As you know, this work is being done under an Act of Congress for the emergency relief of unemployment. As a result of your delay very little relief has resulted thus far. The question of progress on this contract has become critical, and it is necessary that steps be taken at once to greatly increase your rate of progress in the excavation and cofferdam construction. Furthermore, the time allowed for this work is sufficient to permit of its completion only if prosecuted diligently. Unless it is carried forward as rapidly as possible, there is great danger of your becoming responsible for liquidated damages in accordance with Paragraph 6 (b) of the specifications.
>
> A reply at an early date is requested, stating the cause of the continued lack of progress and what steps you are taking to rectify this condition.

15. May 1, 1933, plaintiff replied to Colonel Johnson's letter as follows:

> I have your letter of April 29th with reference to the lack of progress on our work for the construction of Lock and Dam No. 5 on the Green River.
>
> It was our intention at the time of taking this contract to make all of the excavation inside of the cofferdam with dredges, and the borings indicated that this material consisted of sand, gravel, and sandy clay which would handle very easily with an ordinary dredge.
>
> However, upon moving onto the work we find that this material consists largely of gumbo and yellow clay which absolutely refuses to cave to a dredge. We have on the job a 15″ electric dredge and have been forced to provide it with a cutter head in order to handle this material at all, at a great expense and loss of time to ourselves.

Your office had approved of the dredging method of handling this excavation which we believe was the logical way of handling it providing the material was as indicated by the wash borings shown on the Government plans. It was assumed on our part that this large dredge which was moved on the job would handle from four to five thousand cubic yards a day, but the material encountered makes this impossible, as the material will not flow to the dredge and it is necessary to keep continuously moving the dredge to the material, which greatly slows up the production per hour.

As stated before, this condition was unforeseen by us and naturally caused us great delay, as it has been necessary, as stated above, to make changes in our equipment in order that the material could be handled at all. In addition to the one dredge that we have now, we have moved in another 12″ dredge and will within the next few days put an additional 8″ dredge on this work. We have also moved a 50–B Bucyrus Dragline on this work, which will be used to make the slopes and cast the material out to the dredge so that it can be handled, in addition to which, we are going to use one floating clamshell outfit handling material directly into the cells. It is our opinion that this entire outfit should handle as a minimum 2,500 yards per day, and as there are about 70,000 yards to be handled, we anticipate that the dredging inside the cofferdam will be completed about June 1st providing we are not interfered with by high water.

It was our original intention, as you know, to follow the excavation inside the cofferdam by driving the piling under water and that all of the piling would be driven prior to the unwatering of the cofferdam. An examination of our progress chart indicates that the concrete work was not to start until June 20th. This unforeseen condition in the excavation has caused us to alter our schedule in the construction, and immediately upon the completion of the excavation inside of the cofferdam, we will unwater the cofferdam and drive the piling in the dry with cranes, beginning the driving at the upstream end and starting the concrete work immediately upon the completion of enough pile driving so that this work can start. Such being the case, providing we have no further trouble with the excavation and no unforeseen high water or difficulties in unwatering the cofferdam, it is our opinion that the concrete work can start as originally scheduled on or about June 16th. Such being the case, the final completion of the work will not have been delayed at all, but this method of

construction will immediately catch us up to our original schedule. The other method of doing the work was, of course, we considered, more economical, but these unforeseen conditions will have forced us to use this latter method which, of course, is a loss which we are assuming temporarily.

In order to follow this schedule, we anticipate moving onto the job two additional cranes, making a total of five cranes on the job at that time and any other additional equipment which may be necessary in the way of hammers, etc., to follow the above ideas of construction.

You state that the idea of this job was an emergency relief employment and that the result has shown very little relief so far. I can assure you that such is not a fact, as this unforeseen condition has placed us at an enormous additional expense more than that originally contemplated, and this expense has been in material and labor and the relief to unemployment has been far greater than would have been provided the conditions would have been as indicated by the Government when letting this contract.

We believe that we have a legitimate claim for additional cost under Section 105, page 13 of our contract and it is our intention to present such claim at a later date when our additional cost is obtainable and when the unwatering of the cofferdam indicates the exact nature of this material encountered. We would thank you to have your forces make such observations as would be necessary to substantiate our claim.

We can assure you that we deplore very much this unfortunate condition which has arisen, but I believe that you will agree that we are sparing no expense and making every possible effort to get the work completed and believe there will be no material delay in its completion.

Except for the statements of plaintiff's treasurer, referred to in finding 13, the writing of this letter was the first act of plaintiff in making a written claim to the contracting officer alleging changed conditions which it believed were not contemplated by the contract or specifications, and it was the first statement as to any cause for delay or increased costs.

16. May 3, 1933, plaintiff's vice president met Contracting Officer Johnson and his two constructing engineers on the site. They discussed the material then being encountered by

plaintiff, as well as plaintiff's claim in its letter above quoted for losses due to the changed material. Plaintiff suggested that they await the completion of the excavation and then ascertain its losses in the performance of the work called for by the contract and then fix the additional amount to be paid accordingly. The contracting officer was of opinion that, under the terms of articles 3 and 4 of the contract and section 1, paragraph 1–05 of the specifications, any additional amount that might be due plaintiff upon the basis of an equitable adjustment should be determined prior to the completion of the work. An agreement was had that plaintiff would make additional core borings near the location of the original borings, under the direction and supervision of defendant's engineers, to determine whether or not plaintiff had encountered a material change in the character of the materials as disclosed by the borings and described upon the drawings, and in the specifications. Certain borings were accordingly made, and on May 17, 1933 plaintiff's officers met with Contracting Officer Johnson and his engineers at the site and inspected such borings taken by plaintiff. These borings showed larger quantities of clay than had been disclosed by the original wash borings, and also disclosed that it was a yellow clay mixed with blue gumbo of a tough texture and that plaintiff was encountering about a one-foot layer of hardpan of a sand composition.

At that time the contracting officer determined that a materially changed condition had been encountered by plaintiff and that the material so encountered was not such material as that indicated in the original plans and specifications, and he requested plaintiff to submit a statement of its additional costs for performing the entire work called for by the contract because of the changed conditions encountered. Plaintiff still contended that the amount of additional costs should not be determined until after the excavation was completed, but the contracting officer insisted that under the contract and specifications the additional price to be determined and the equitable adjustment to be made under the contract should be fixed in advance of completion, on the basis of the character of the material then disclosed and the

estimated increased costs of performing the entire contract by reason of the changed conditions encountered. Accordingly, the contracting officer requested plaintiff to submit to him a computation showing its estimated costs and expenses of performing the contract under the changed conditions in excess of the costs and expenses of performing the contract as originally made under the conditions therein specified. The contracting officer also commenced an investigation to determine the increased costs and expenses of performing the entire contract under the changed conditions encountered for the purpose of arriving at the amount by which the contract price should be increased so as to make the equitable adjustment contemplated and required by articles 3 and 4 of the contract. The contracting officer's first decision as to the equitable adjustment in the matter under articles 3 and 4 of the contract is hereinafter set forth in finding 20.

17. Soon after Contracting Officer Johnson determined that there was a materially changed condition, the Bolz Dredging Company demanded that it be released from its contract with plaintiff, because the excavation was not the same as that on which it had bid. Plaintiff then effected an arrangement with the Bolz Company which provided that plaintiff would assume the payment of its subcontractor's labor, material, and supply bills, and insurance, and compensate it for expenditures made prior to such determination by the contracting officer. Bolz Company completed the excavation work and plaintiff paid the Bolz Company the sum of $31,411.98, representing such payment for labor, material, insurance, and supplies.

18. April 28, 1933, the Bolz Company, in addition to the 15″ suction dredge, had placed on the job a 12″ suction dredge with a capacity of 3,000 cubic yards per day, and May 4, 1933 it had placed on the job a 10″ Diesel suction dredge with a capacity of 2,000 cubic yards per day. Neither of these dredges was equipped with a cutter head. Plaintiff also used a crane, two derrick boats, and a 50-B dragline. The 15″ suction dredge was removed from the site on June 2, 1933, and the 10″ and 12″ dredges stopped

work in the lock cofferdam on June 5, 1933. Both the 10″ and 12″ suction dredges were later used in excavating for the guide walls. June 5, 1933, the excavation within the lock cofferdam was stopped, and June 14 the unwatering of the cofferdam was completed.

19. Plaintiff's original plant layout indicated that it would complete the excavation for the lock and guide walls before the unwatering of the cofferdam, and that it would drive wood piling and permanent steel sheet piling from a floating pile driver. This plan contemplated that shortly after plaintiff had completed its dredging excavation, it would have completed the driving of wood piling and steel sheet piling. Plaintiff was not able to keep up with its progress schedule and closed the cofferdam before excavating for the upper and lower guide walls. Plaintiff had planned to have all excavation finished in the lock and upper and lower guide walls and the piles driven by June 6, 1933. This program could not be carried out because of the delay in excavation and in closing the cofferdam before excavating for the upper and lower guide walls. This changed plan required plaintiff to employ two more cranes for pile driving. According to plaintiff's progress schedule, the lock cofferdam was to have been completed in 89 days. It was unwatered 24 days beyond this date. The concrete operations in the lock cofferdam began 34 days later than contemplated in plaintiff's progress schedule.

20. May 26, 1933, plaintiff, pursuant to the request of the contracting officer and in connection with the determination by the contracting officer of the amount to be allowed as an equitable adjustment for the performance of the entire contract under the changed conditions encountered (see finding 16), submitted to the contracting officer a letter of that date accompanied by schedules of estimated increased costs for the performance of the contract under the changed conditions encountered, showing a "total loss" of $23,287.91 by reason of the changed conditions.

The contracting officer, with the assistance of his engineers, likewise made an estimate of the probable increased costs and expenses on the same basis. Upon consideration

of these investigations and the figures disclosed thereby Contracting Officer Johnson June 7, 1933 issued "Change Order No. 2, dated June 7, 1933," in which he fixed the amount of the equitable adjustment called for by the contract by increasing the contract unit price for common excavation from 15 cents per cubic yard to 37½ cents per cubic yard. This change order is as follows:

> Reference is made to Articles 3 and 4 of your contract No. W559 eng-2991, dated January 19, 1933, for constructing Lock and Dam No. 5, Green River, Ky., work under which is now in progress.
>
> It has been determined that in view of your having encountered, in excavating for the lock and guide walls, subsurface conditions materially differing from those shown on the drawings and indicated in the specifications, consisting of compact clayey materials, which in the opinion of the contracting officer can not be removed at the contract price for the common excavation, it is necessary and in the best interest of the United States to modify said contract in certain particulars as follows:
>
> "All common excavation for the lock and guide walls, except that which has been and is to be removed with a dragline, will be paid for at the unit price of Thirty-seven and one-half cents ($0.37½) per cubic yard instead of Fifteen cents ($0.15) per cubic yard, as originally provided for in the contract. The total quantity to be paid for at the increased price is estimated to be 107,850 cubic yards. The payment of this increased price for common excavation for the lock and guide walls shall also liquidate in full all costs incurred by the contractor in making additional borings and taking additional cores to determine the character of the material to be excavated. Payment will be made as provided in Paragraph 9 of the specifications."
>
> It is understood and agreed that on account of the foregoing modification of said contract, 45 calendar days' additional time will be allowed for completion.
>
> It is further understood and agreed that all other terms and conditions of said contract as modified by Change Order No. 1, shall be and remain the same.
>
> This change order, being in excess of $500.00 in amount, does not become effective until approved by the Chief of Engineers.

Therefore, if the foregoing modification of said contract is satisfactory, please note your acceptance thereof in the space provided below.

Yours very truly,

W. A. JOHNSON,
Lieut. Col., Corps of Engineers,
District Engineer.

The foregoing modification of said contract is hereby accepted:

Date June 6, 1933.

FRAZIER-DAVIS CONSTRUCTION COMPANY,
By ADRIAN W. FRAZIER, *President.*

The cost to plaintiff of making the additional core borings, hereinbefore referred to, in May 1933 was $457.92, and that amount had been included by plaintiff and the contracting officer in their computations, on the basis of which the contracting officer arrived at 37½ cents per cubic yard as an equitable adjustment by reason of the changed conditions encountered. The increased unit price of 37½ cents per cubic yard gave plaintiff an equitable adjustment for the estimated increased costs and expenses of performing the entire contract under the changed conditions encountered of $24,724.17, which was $1,436.26 greater than plaintiff's estimated "total loss" which would result from the materially different conditions encountered.

This change order was agreed to, signed and accepted by plaintiff "June 6, 1933," as shown thereon (but in fact on June 7), and was returned to the contracting officer with the following letter of June 8, 1933:

> We are returning to you herewith Change Order No. 2 which has been accepted by us.
>
> We wish to, indeed, thank you for the equitable manner in which you have handled this proposition.

This change order, insofar as the amount of the equitable adjustment provided for therein was concerned, was not approved by the head of the department when it was transmitted by the contracting officer after having been accepted and agreed to by plaintiff. Confusion resulted thereafter, as hereinafter more particularly set forth. However, in the end and after all of the work under the contract had been

completed, the head of the department, upon a review of the whole matter and under the facts and circumstances hereinafter set forth, determined and allowed an equitable adjustment by reason of the changed conditions encountered, which was in excess of the amount of the equitable adjustment provided for in "Change Order No. 2, dated June 7, 1933," above mentioned.

21. The basis of the objection of the Chief of Engineers to "Change Order No. 2, dated June 7, 1933," related only to the fact that, in arriving at the increased unit price for common excavation which would provide an equitable adjustment for the performance of the entire contract by reason of the changed conditions encountered, the contracting officer had taken into consideration all the increased costs and expenses and time consumed prior to May 1, 1933, which was the date on which plaintiff had first called the matter to defendant's attention, and the change order was returned to the contracting officer for a proper adjustment on this account only. Thereafter the contracting officer, on the basis of cost figures prepared by him and plaintiff, issued "Change Order No. 2, dated July 15, 1933," which was sent to plaintiff for its acceptance with a letter of that date, as follows:

> Change Order No. 2, dated June 7, 1933, signed by your Mr. Frazier on June 8, 1933, was not acceptable. A change order can apply to work performed after a changed condition has been recognized as such by the contracting officer, or attention of the contracting officer called to the conditions by the contractor. Therefore, all of the material excavated prior to the date of your letter of May 1, 1933, in which you stated that you had encountered changed conditions, must be paid for at the contract unit cost price.
>
> Change Order No. 2 dated June 7, 1933, is therefore void, and Change Order No. 2 dated July 15, 1933, is submitted in lieu thereof. In addition to the increased contract cost price provided for in the change order, you will be further reimbursed by payment for the boring, by the amount stated on the inclosed open market purchase order.
>
> The actual increased contract cost price may slightly differ from the estimate, as the classification of the material in the guide wall will depend upon the actual character of the material encountered. All of the com-

pact, clayey material in the guide wall excavation will be paid for at the change order unit price for compact clayey materials.

If this change order is accepted by the Chief of Engineers, the District Engineer will classify the materials in the lock and guide wall excavation as follows:

Excavation between May 1, 1933, and June 30, 1933:		
Common excavation at $0.15 per cu. yd	2,888	$433.20
Compact clayey materials at $0.35 per cu. yd	69,624	24,368.40
Total	72,512	24,801.60
Excavation allowed on monthly estimate including retained percentage	72,512	10,876.80
Adjustment for work on May and June estimate		13,924.80
Estimated remaining excavation on June 30, 1933, classification to depend upon actual character of materials encountered:		
Estimated quantity common excavation at $0.15 per cu. yd	19,000	2,850.00
Estimated quantity compact clayey material at $0.35	41,500	14,525.00
Total	60,500	17,375.00
Earning at contract unit cost price	60,500	9,075.00
Estimated increased earnings under change order for work subsequent to June 30, 1933		8,300.00
Estimated total adjustment		22,224.80

It is requested that three copies of the change order be executed and returned to this office, retaining the other carbon copy for your file. An approved copy will be furnished you, when available.

"Change Order No. 2, dated July 15, 1933," which accompanied the above-quoted letter, was in all respects the same as "Change Order No. 2, dated June 7, 1933," except that it fixed the equitable adjustment at 35 cents instead of 37½ cents per cubic yard and the extension of time at 40 days, instead of 45 days, by reason of the exclusion of the period prior to May 1. This change order was returned by plaintiff to the contracting officer with a letter dated July 18, 1933, as follows:

I am returning to you herewith Change Order No. 2 which has been altered in accordance with your letter of July 15th and which has been accepted by us.

22. July 20, 1933, Contracting Officer Johnson forwarded "Change Order No. 2, dated July 15, 1933," to the head of the department, through the Division Engineer at St. Louis and the Chief of Engineers, for his approval, with a letter, in part, as follows:

> 3. The materially different character of the sub-surface conditions in the excavation was brought to the attention of the contracting officer on May 1, 1933, by the contractor. The contracting officer immediately made a thorough investigation of the excavation for the lock and guide walls. The contracting officer decided that the character of sub-surface materials to be excavated were materially different from those shown by the drawings [and] in the specification.
>
> 4. The accompanying blue print, "Borings During Progress of the Work," shows the location of all borings made at the site and indicates the material difference in the character of the sub-surface materials encountered and the character of the materials indicated by the specifications and shown by the drawings. With the exception of one hole, No. 80, near the lower end of the proposed guide wall, all of the 16 holes bored prior to opening bids were wash borings and no samples of the materials encountered therein were placed on exhibit in the Louisville office for inspection by prospective bidders. The inaccuracy of the logs of the borings Nos. 25, 26, 27, 30, 78, and 79 as to the actual character of material, is shown by the log of holes No. 95–103, which were core borings made for the investigation. The samples on exhibit for inspection of prospective bidders, consisting of three samples from hole No. 80 and samples from borings at the original proposed site of the lock, did not represent the actual character of the material at the site. The sub-surface materials, consisting of substantial quantities of a very compact clayey material with occasional small areas of thin strata of cemented sand, are materially different from the materials indicated in the specifications and shown by the drawings.
>
> 5. It is the opinion of the District Engineer that if the sub-surface materials had been of the character indicated by the specifications, the contractor's cost of removing the materials would have been less than his bid price for common excavation. The unit price fixed in the change order is considered both an equitable contract cost price for removal of the compact clayey mate-

rials and an equitable adjustment of the bid price for removing materially different character of sub-surface materials than indicated in the specifications and shown by the drawings.

6. The allowance of forty calendar days additional time for completion is believed equitable. The encountering of the materially different character of material in delaying the excavation, delayed the completion of the contract work. The procurement of additional suitable equipment to meet the changed conditions could not have been accomplished in time to expedite the excavation.

7. Since the compact clayey material encountered by the contractor in making the excavation for Lock No. 5, Green River, is materially different from the materials indicated in the specifications and shown on the drawings, it is requested that Change Order No. 2 be approved. The estimated increased contract cost price is $22,000.00.

23. On August 7, 1933, Contracting Officer Johnson wrote the Division Engineer at St. Louis as follows:

1. It is the opinion of the District Engineer that if the materials were as described in the original specifications, the contractor could have earned a fair profit in removing the common excavation at his bid price of 15 cents per cubic yard. The price fixed in the change order is considered equitable adjustment of the contractor's bid price for common excavation, covering the increase of cost of removing clayey materials in lieu of the materials specified.

2. The original estimate of the District Engineer for removing the common excavation at 28 cents per cubic yard, was not considered applicable because the estimation was for performing the work with dipper dredge and scows, the only suitable government plant available. The materials as specified could have been removed with a hydraulic dredge at a considerably lower unit cost.

3. A survey of the various bids was not considered a fair method of estimating the cost of removing the materials originally specified. It is understood that the subcontractor who performed the excavation had tentative agreements with other bidders whose bids exceeded the bid of the Frazier-Davis Construction Company. It is believed that the variation in the bids results from the difference in anticipated profit, and the difference

in cost of removing material with different types of equipment.

4. An increased unit cost of twenty cents per cubic yard was estimated to be a fair allowance for the subsurface material which constituted the changed condition encountered by the contractor. The determination of the equitable unit price was made for the cost of removing the compact clayey materials with the equipment that could have moved the materials as specified for less than the bid price.

5. It was determined that the excavation remaining when the changed condition was encountered could be most expeditiously and economically handled by equipment at the site. Also, since breaking up the material with a dragline materially increased the rate of removal of the compact clayey materials, it was economical to use a dragline with the hydraulic dredge. The basis of determining an equitable adjustment of the unit price for common excavation is based on the estimated twenty-hour working day performance in the two classes of material. It is estimated that the 15-inch hydraulic dredge could handle 3,900 cubic yards per day of the material specified, and the dredge and dragline could handle 1,800 cubic yards of the changed material.

24. Upon receipt of the changed Change Order No. 2 and the letter quoted in the preceding finding, the Division Engineer at St. Louis wrote District Engineer Johnson asking for additional information, and thereafter, on August 11, 1933, the Division Engineer at St. Louis wrote the Chief of Engineers as follows:

1. The data submitted in support of the proposed adjustments of cost and time in change order No. 2, have been the subject of careful study. This office differs greatly with the District Engineer's [contracting officer] finding as to the equitable adjustment of cost. There are forwarded herewith 1st and 2nd wrapper indorsements, which are necessary to understand the divergent opinions.

2. The finding of the District Engineer that subsurface conditions materially differ from those specified is concurred in, as is the finding of forty days' additional time. This office considers reasonable the District Engineer's analysis resulting in his estimate of 35¢ a cu. yd. for the cost of excavating material of the character found. Exception is taken to the proportion of the 35¢

which it is proposed to allow the contractor because of the changed character of the material encountered.

3. A measure of the difference of cost of excavating the more difficult material is found by a comparison of the District Engineer's original estimate of 28¢ per cu. yd. and his new estimate of 35¢ per cu. yd. Eliminating questions of efficiency or character of plant or methods, this spread of 7¢ is the approximate measure of relative difficulty of excavating the two materials—the material as specified and the material as found. Allowing a profit of 12½% on this 7¢ spread results in an equitable adjustment of .0787½ per cu. yd. This may reasonably be taken as 0.08 per cu. yd.

4. Whether the contractor's original bid of 15¢ per cu. yd. was too low by inadvertence or inexperience, or was deliberately low in an unbalanced bid, this 15¢ constituted the basis on which he was low bidder.

5. It is recommended that the District Engineer be advised to inform the contractor that he will be allowed 0.08 per cu. yd. as an equitable adjustment for changed subsurface conditions in the yardage excavated after May 1st. The unit cost for this material will be 0.23.

6. Under the provisions of Article 4 of the contract, contractor should be allowed thirty days in which to submit a written appeal to the Chief of Engineers.

The Chief of Engineers, acting under instructions from the head of the department, accordingly returned "Change Order No. 2, dated July 15, 1933," to the District Engineer and Contracting Officer at Louisville for modification so as to base the equitable adjustment on an increase of the unit price for common excavation from 15 cents to 23 cents per cubic yard.

Accordingly, District Engineer and Contracting Officer Johnson thereafter on August 30, 1933 prepared a new Change Order No. 2 of that date as follows:

Reference is made to Articles 3 and 4 of your contract No. W559 eng-2991, dated January 19, 1933, for constructing lock and dam No. 5, Green River, Ky., work under which is now in progress.

It has been determined that in view of your having encountered in excavating for lock and guide walls, subsurface conditions materially different from those shown on the drawings and indicated in the specifications, consisting of compact clayey materials, as stated in your letter of May 1, 1933, reporting changed condi-

tions, it is necessary and in the best interest of the United States to modify said contract as follows:

For the excavation of the lock and guide walls after May 1, 1933, the unit price, for common excavation, materially differing from the materials shown by the drawings and indicated in the specifications, consisting of clayey materials, will be twenty-three cents ($0.23) per cubic yard.

The above change involves the following approximate changes in the contract cost price:

Increase of 110,000 cu. yds. of common excavation materially differing from materials shown by drawings and indicated by specifications, consisting of clayey materials, at $0.23 per cy	$25,300.00
Decrease of 110,000 cu. yds. of common excavation of the character shown by drawings and indicated by specifications at $0.15 per cu. yd	16,500.00
Net approximate increase in contract cost	8,800.00

Payment will be made as provided in paragraph 9 of the contract.

It is understood and agreed that on account of the foregoing modification of said contract, forty (40) calendar days additional time will be allowed for completion.

It is further understood and agreed that all other terms and conditions of said contract, as modified by Change Order No. 1, shall be and remain the same.

This change order, being in excess of $500.00 in amount, does not become effective until approved by the Chief of Engineers.

Therefore, if the foregoing modification of said contract is satisfactory, please note your acceptance thereof in the space provided below.

25. September 1, 1933, Contracting Officer Johnson sent the above-quoted Change Order No. 2 to plaintiff with a letter advising plaintiff that "Change Order No. 2, dated July 15, 1933," was null and void, since it did not meet with the approval of the Chief of Engineers, and that the latter would approve only a change order which provided for an increase of 8 cents on the contract price and 40 days' additional time. He inclosed "Change Order No. 2, dated August 30, 1933," advising plaintiff of its right to appeal, and requested that he be advised of plaintiff's acceptance or its intention to appeal.

Plaintiff refused to sign "Change Order No. 2, dated August 30, 1933," and on September 6, 1933, it replied that: "As requested in your letter, this is to advise of our intention to appeal and not to accept this order."

On September 7, 1933 the contracting officer advised the Chief of Engineers of plaintiff's intention to appeal to the head of the department, and on the same date Contracting Officer Johnson wrote plaintiff as follows:

> The method of appeal in case of disputes between the contractor and contracting officer is stated in Article 15 of the contract. Attention is directed to the requirement that the appeal be made in writing to the head of the Department, who in this case is the Secretary of War. It is suggested that the appeal be forwarded through the District Engineer, which procedure will expedite action by the Department.
>
> Change Order No. 2, which was not acceptable to you, recognized that a changed condition was encountered on May 1, 1933, which involved 110,000 cubic yards more or less of common excavation. The District Engineer recommended an increase of the unit price of excavating the material from fifteen cents (0.15) to twenty-three cents (0.23) per cubic yard and forty (40) days' additional time for the performance of the contract.
>
> There is no prescribed form for an appeal under Article 15 of the contract. The decision of the head of the Department will probably be made from the facts as presented in the contractor's letter of appeal, and the report of the District Engineer. The appeal should, therefore, fully present your case.
>
> The Chief of Engineers disapproved our former tentative agreement on the grounds that the adjustment was not equitable to the United States. Eight cents ($0.08) per cubic yard was considered as an equitable adjustment to compensate the contractor for the relative difficulty of excavating the materials encountered and the materials specified.

26. September 19, 1933 plaintiff appealed to the Secretary of War in a letter of that date written to the Chief of Engineers in support of its appeal, and mailed by the contracting office to the Chief of Engineers through the Division Engineer at St. Louis, as follows:

> Under date of May 1st, 1933, we notified your District Engineer at Louisville, Kentucky, that the earth excava-

tion involved in the construction of Lock & Dam No. 5 on the Green River differed materially from that indicated by the borings and plans covering this work, and we requested an adjustment be made by the Government, in line with Section 1–05 of the specifications covering the excavation.

Thereupon, the Government took immediate steps to make a thorough investigation by taking additional borings on the site to determine whether our contention was correct. A thorough investigation was made by the Government Engineers at the site of the work with these new borings and the actual material being excavated at the time as evidence, and it was thereupon determined by the Government Engineers that our contention was absolutely correct and that there was a material difference beyond any doubt in the materials being excavated from that as indicated by the original borings and plans.

We, therefore, under date of May 22d, made a formal written claim for our additional costs for the handling of this excavation, our claim being based on the cost per cubic yard of handling excavation at the time the claim was made, namely May 1st to the final completion of the excavation. An examination of this claim will show that in arriving at this cost of excavation, no costs were included for inadequate equipment which had been previously moved on the work and which was determined would not handle the excavation encountered, but the costs only included the operating and incidental costs of fully adequate equipment to do the work intended. This included one 15″ electric dredge fitted with a cutter head; one 12″ Diesel Dredge; one 8″ Diesel Dredge, and one 50–B Dragline. We believe this the most suitable equipment obtainable in the Mississipi Valley for this particular piece of work which would have been passed through locks on the Green River, and no objection has ever been made by the Government that this equipment was not proper and fitted for the work, and that the work was not done in any other than an economical and proper way.

In due course of time, namely under date of June 7th, a Change Order was issued by the Louisville office allowing us a contract price of 37½¢ per cubic yard for 107,850 cubic yards of excavation in question instead of 15¢ per cubic yard which is our contract price, and 46 [45] days additional time on our contract.

The above price of 37½¢ was evidently arrived at by the Government from the figures we had presented and from the costs they had kept of yardage already han-

dled and projected over additional yardage yet to be handled.

This Change Order was accepted by us, but was later superseded by another Change Order under date of July 15th which allowed us 35¢ a cubic yard for 110,-000 cubic yards of changed material instead of 15¢ per cubic yard as per our contract price, and 40 days additional time on our contract. You will please note a change in price between these two Change Orders from 37½¢ to 35¢ and in time from 46 [45] to 40 days. We felt that this change in price and time was not satisfactory, but in order to rush the proposition through to a conclusion and not open up new controversies on the various issues involved, we accepted this second Change Order.

Under date of August 30th we received another change Order in lieu of those previously issued, allowing us 23¢ per cubic yard for 110,000 cubic yards instead of the 15¢ as per our contract price and 40 days additional time on our contract.

This latter Change Order we refused to accept under date of September 6th as being unjust.

We believe that no additional argument is necessary as to the fact that there is a materially changed condition in the excavation involved and this changed condition, together with the yardage involved is not in dispute and has been admitted by the Government. The point at issue, therefore, rests entirely with the price the Government is to pay for this materially changed condition.

Section 1–05 of the detailed specifications covering excavation which is a part of our contract reads as follows: * * *

In making our estimate before placing a bid on this work, it was construed by our Company from the above specification that it was the intention of the Government, that should the excavation encountered on the work be more difficult than that indicated on the plans and shown by the borings, that they would pay any fair cost which might arise due to such a condition. We believe this to be eminently fair and good business on the part of the Government to have this Article in their specifications as it relieves the contractor of the hazards which ordinarily occur in the excavation and he is not required to figure any contingency thereon. For the above reason our Company did not figure any contingency on the excavation, but our bid price contemplated handling the material exactly as indicated by

borings and plans and we relied on the fact that if such were not the case that the Government would pay the fair cost of handling any material which was more difficult than that indicated.

The excavation for the lock has now been practically entirely completed and we find that we were very unfair to ourselves in accepting Change Order dated June 7th or Change Order dated July 15th, as conditions wholly unanticipated arose after our acceptance of these Change Orders which greatly increased our cost over that allowed. This compact clayey material which we encountered on this site was of such a nature that it would stand almost absolutely vertical when under water and would not flow to a dredge, which increased the cost of excavation. We had anticipated that with this character of material that under those conditions it certainly would stand on a one-to-one slope, as indicated on the plans, but to be absolutely safe we excavated the material on a one-and-one-half-to-one slope. However, it developed that when the cofferdam was unwatered there was some slick strata right at the bottom of the excavation, and this material was of such a nature that when the cofferdam was unwatered the banks came in and assumed a two-to-one slope which was something that was certainly unanticipated by us and everyone else, and we were forced to a great additional expense and loss of time of removing this large additional excavation from the bottom of the cofferdam, for which the contract provided no payment.

Our actual costs of excavation to date on material are approximately 60¢ per cubic yard and we believe that an investigation of the cost records of the Government taken on the site of the work will fully verify this.

In view of the above information given we cannot understand how it is at all possible for the Government in any manner to justify Change Order dated August 31st [30th], 1933, allowing us a cost of 23¢ per cubic yard on this excavation. It is an established fact by all records, both ours and the Government's, that this is not a fair award, and further, that the previous Change Order as of July 15th, allowing us a cost of 35¢ per cubic yard is a settlement which is more than fair to the Government and which leaves us bearing an enormous loss on this excavation which the Government admits is no fault of ours. Therefore, we beg of you that this whole matter be reviewed and another Change Order be awarded us in the light of the new information now available.

We might add that our Company has raised wages in accordance with the President's N. R. A. Program and are cooperating with the Government in every way possible along the Reconstruction Program which is costing us a great deal of additional money, and we sincerely hope that this will be borne in mind and that the Government will endeavor in every way to treat us as fairly as possible under our contract.

27. September 27, 1933, the Division Engineer at St. Louis, in compliance with the customary procedure in such cases, wrote the Chief of Engineers as follows:

1. I am inclosing a letter of September 19, 1933, from Mr. Adrian W. Frazier, President, which is an appeal of Frazier-Davis Construction Company from Change Order No. 2 dated August 30, 1933, under contract No. W559eng-2991, for constructing Lock and Dam No. 5, Green River, Kentucky. The Division Engineer has given the contractor two hearings and has carefully reconsidered the facts as newly presented.

2. In 1st indorsement on the subject, dated August 11, 1933, this office concurred in the District Engineer's [contracting officer] estimate of 35¢ per cu. yd. as a reasonable unit price under the discovered conditions, but interpreted Article 4 to set forth an adjustment based not on the final costs, but on the portion of the final costs occasioned by the changed conditions. The recommendation that contractor be allowed an increase of 0.08 per yd. for the more difficult material was a literal compliance with Article 4 of the standard form of contract, "and any increase or decrease of cost and (or) difference in time *resulting from such changes* shall be adjusted as provided in Article 3 of the contract."

3. The contractor relies on par. 1–05 of the specifications. He interprets that paragraph to mean that there would be a readjustment of the unit price for excavation dependent on conditions met. If this interpretation is correct, contractor is entitled to the adjustment recommended by the District Engineer in the change order—35¢ per cu. yd.

4. Since the contractor's interpretation of par. 1–05 of the specifications is reasonable, it is now recommended that the appeal be granted, that change order No. 2, dated Aug. 30, 1933, be withdrawn and change order dated July 7, [15] 1933, be approved.

5. I have notified the contractor that he will be given a hearing by the Chief of Engineers, before an adverse decision is made.

28. Upon consideration of plaintiff's appeal as above set forth in finding 26, the Chief of Engineers and the Secretary of War decided that "Change Order No. 2, dated July 15, 1933," fixing the equitable adjustment under Articles 4 and 3 on an increased unit price of 35 cents per cubic yard, was correct and, upon the showing made in plaintiff's appeal, approved this Change Order of July 15. Accordingly, this change order was approved October 25, 1933 and returned to the contracting officer for delivery to plaintiff, and was so delivered November 1, 1933.

29. A supplemental voucher, dated November 14, 1933, was issued in the amount of $15,588.40 for common excavation. It covered payment for 77,942 cubic yards of common excavation which plaintiff had disposed of between May 1, 1933 and October 31, 1933, and was calculated at the rate of 35 cents per cubic yard, in accordance with the approved "Change Order No. 2, dated July 15, 1933." The voucher was signed by plaintiff's president without any protest and a check was accordingly issued and delivered on November 16, 1933 for that amount. Defendant issued vouchers each month from November 1, 1933 to June 20, 1934, each at the rate of 35 cents per cubic yard under the contract as modified by said Change Order No. 2, covering common excavation, and each voucher was signed by officers of plaintiff without protest, and payments were duly made thereon and received by plaintiff.

In a letter dated December 23, 1933 plaintiff admitted it had agreed to the terms of Change Order No. 2 dated July 15, 1933.

30. Colonel Johnson, the contracting officer, was District Engineer, located at Louisville, Kentucky, until November 17, 1933, when he was transferred to another assignment. Thomas F. Kern was Acting Contracting Officer and District Engineer from that date until November 27, 1933, when Col. Gilbert Van Wilkes became District Engineer and Contracting Officer, succeeding Colonel Johnson.

The lock cofferdam was unwatered June 14, 1933. During its unwatering about 18,650 cubic yards of bank caved in, which it was necessary for plaintiff to remove. November 23, 1933, plaintiff advised Contracting Officer Kern in writing that a large quantity of soil, which it claimed was materially different from that originally contemplated and disclosed in the borings and drawings, had caved into the cofferdam after it had been unwatered, and plaintiff expressed its belief that defendant should pay it under "Change Order No. 2, dated July 15, 1933" for excavating or removing this caved-in material, as well as for the additional backfill that would be necessary to be placed because of the slide. November 25, 1933, Acting Contracting Officer Kern found and decided that plaintiff was not entitled to extra payment for removing the slide material, and advised plaintiff in writing on that date that defendant would not pay for removal of such slide material, since Change Order No. 2 adjusted the unit price for common excavation because plaintiff had contacted heavy clayey materials where loam had been expected, and since plaintiff had expected to encounter sand and loam which would not stand up under the circumstances that caused the slide, and since plaintiff was being paid for the original excavation on the basis of the increased price stated in Change Order No. 2, it was not entitled to additional compensation at the new rate of 35 cents for removing the additional loam under subdivision (g) of paragraph 1–05, section 1, of the specifications.

Plaintiff did not appeal to the head of the department from this decision within 30 days, as required by article 15 of the contract. November 28, 1933, plaintiff advised Contracting Officer Wilkes that it would insist on being paid for both the slide material and the backfill at the rate specified in Change Order 2 as having been caused by the changed conditions encountered. February 27, 1934, however, plaintiff made a second demand on Contracting Officer Wilkes for payment for the 18,650 cubic yards of material which had slid into the lock cofferdam and for additional material used for the backfill, for the asserted reason that the slide was caused by the materially different character of material en-

countered by plaintiff which had given rise to "Change Order No. 2, dated July 15, 1933." March 8, 1934, Contracting Officer Wilkes denied this second request, stating:

> This is in answer to your letter of February 27, 1934. It appears that the claim stated in this letter has already been considered by this office. The claim was stated in general terms in a letter from you dated November 23, 1933, and was disallowed by the then acting District Engineer on November 25, 1933.
>
> Change Order No. 2 merely changed the unit price for certain portions of the material. It did not change the specifications in any other particular. The specifications clearly fix an arbitrary slope of 1:1 for payment for this excavation. It is to be presumed that the change order established the unit price for this material after consideration of all its characteristics by yourself and the District Engineer, and that the price was predicated upon the methods of measurement prescribed in the specifications. The total allowance for the difference in the material encountered from that described in the specifications has been fixed by the change order, and I am not able to reopen it for further consideration.
>
> I must therefore disallow the claim submitted in your letter of November 23, 1933.

March 23, 1934, plaintiff replied to the letter of District Engineer Wilkes and closed with the following sentence: "We, therefore, most respectfully notify you that under the power granted us in our contract we intend to appeal the adverse decisions and conditions encountered under Change Order No. 2."

31. April 3, 1934, plaintiff wrote the Secretary of War with reference to the matters mentioned in the preceding finding, as follows:

> In connection with our contract for the construction of Lock & Dam No. 5, Green River, Kentucky, dated January 19th, 1933, there was issued in connection with the excavation for the Lock, and due to a materially changed condition, a Change Order dated July 15th, 1933, and approved by the Chief of Engineers on October 25th, officially designated as Change Order No. 2, covering the increased cost to us in view of our having encountered subsurface conditions materially different from those shown on the drawings and indicated in the specifications.

Since that time there has arisen a difference of opinion in the interpretation of this Change Order between the Contracting Officer and ourselves, and the Contracting Officer on March 8th has ruled adversely to our contentions.

We have filed with the District Engineer at Louisville partial arguments covering our contentions in this matter. We wish to appeal from his decisions, and will at a future date submit for your final decision amended and elaborated data covering the whole of this matter which we are unable to obtain and present at this time.

We would, therefore, request that you consider this as our formal appeal and withhold final decision until such time as we are able to file our complete argument for your decision.

July 31, 1934, plaintiff forwarded, through the office of the contracting officer, to the Secretary of War its appeal, and its extended statement and argument in support of its position that the changed conditions covered by Change Order No. 2 were applicable to this material. Plaintiff also inclosed therewith its itemized cost of excavation involved, together with its claim for costs due to delays and a detailed discussion of same, and it requested to be allowed 90 days' extension of time in addition to that allowed under Change Order No. 2.

32. Several conferences were had between plaintiff and the Chief of Engineers covering the claim made in the appeal so filed with the Secretary of War. In one of these conferences the Chief of Engineers considered plaintiff's claim and contention that defendant should pay the difference between the original contract price of 15 cents per cubic yard and the actual cost to plaintiff of the removal of the caved-in common excavation. Before consideration of this appeal had been concluded by the Chief of Engineers and Secretary of War, all contract work had been completed and accepted September 19, 1934. October 2, 1934, District Engineer and Contracting Officer Wilkes wrote the Chief of Engineers, at the request of the latter, a comprehensive letter concerning plaintiff's appeal on payment for the slide material. He concluded the letter with the recommendation that plaintiff's appeal be denied, as follows:

The formal appeal of the contractor against my decision is extremely irregular. It breaks new ground not covered by the claim. In fact, it is an entirely new claim. The basis of the old claim is restated but the contractor emphasizes the alleged unfairness of Change Order No. 2 and he now claims that he ought to be paid the difference between the alleged cost of excavation and the amount that he has been paid for it to date. This, he says, amounts to $60,467.09. The appeal is really an appeal against Change Order No. 2 and not really against my decision as it pretends to be. Change Order No. 2 was accepted by the contractor over a year ago; entirely too long ago to be subject to appeal now even if the contractor had not accepted it when it was issued. The basis of the appeal is the claim that conditions encountered by the contractor were materially different from what he believed them to be when he signed the change order.

* * * * *

33. All work required by the contracting officer and called for by the contract as changed from time to time was completed and accepted September 19, 1934. Plaintiff previously had prepared and submitted to the contracting officer a computation of claimed increased costs over the changed unit contract price and for remission of liquidated damages, totaling $90,445.00, which it then and now claims were due to encountering material in its excavation that was materially different from that contemplated and described in the original contract, and should be paid by defendant. The computation insofar as it related to claimed net increased costs of $78,070.48 was in support of its appeal of September 19, 1933 (findings 26 and 27). The balance of $12,375 was for remission of liquidated damages. The summarization of the report and computation in support of the appeal is as follows:

Basis of this computation is difference between fair cost of performing excavation originally and fair cost of excavating material as found. The unit contract price is used as the fair cost of excavating materials as originally shown, and the cost actually incurred are used as the fair cost of excavating the materials as found.

Direct Costs of Labor, Equipment, Material, Supplies and Services (Items "C", "D", "E" and "F", plus Compensation Insurance.)		$84,644.11
Cost due to delays:		
Equipment rentals paid others (Item "G")		7,615.30
Field Office, supervisory and contingent expense (Item "H")		8,776.30
Additional cost of steel erection (Item "I")		2,009.47
Item "J". Home office charges for heat, light, rent, postage, telephone and telegraph, employees, salaries, etc. (Page 7A)		24,789.50
		127,834.68
Item "K". Additional Bond Premium required due to increase in contract liability (1½% of $127,834.68)		1,917.52
		129,752.20
Item "L". Payment for replacing slide material with fill, at contract price. 18,670 yds. at $0.35		$6,527.50
Total cost due to changed material		136,279.70
Item "M". Less original contract price of 187,263 yds. at $0.15, found by District Engineer to be cost of handling original excavation paid on regular estimates		28,089.45
Total increased cost		108,190.25
Plus 10% profit		10,819.02
		119,009.27
Item "N". Less payments under Change Order No. 2 for 94,079 cu. yds. changed material at additional payment of $0.20 per cu. yd	$18,815.80	
Additional payments authorized by Chief of Engineers and Comptroller General	22,122.99	
		40,938.79
		78,070.48
Item "O". Plus liquidated damages erroneously assessed:		
61 days at $200.00		12,200.00
7 days at $25.00		175.00
Balance due Frazier-Davis Claim		90,445.48

34. After this suit was instituted defendant had its auditor examine plaintiff's books and records for the purpose of checking and verifying the figures making up the claimed increased expenses mentioned in the preceding findings. This audit set out on each page figures arrived at by the auditor from plaintiff's records as compared with the figures contained in plaintiff's exhibit 59.

Plaintiff agrees in this proceeding that defendant's figure of $28,065.23 is correct rather than its claimed figure of $28,089.45. The expense to plaintiff of removing the common excavation, in excess of the original contract price of 15 cents per cubic yard and 35 cents per cubic yard as provided by "Change Order No. 2, dated July 15, 1933," effective May 1, 1933, was caused not only by encountering material of a different character but, in part, by the fact, first, that Change Order No. 2 was under Article 4 of the contract made effective May 1, 1933 and, second, by plaintiff's equipment, which for a time before and after the effective date of Change Order No. 2 was not suitable or adequate for excavating the materials as encountered. Plaintiff and defendant in this proceeding agree to the correctness of the amounts determined by defendant's auditor and set out in his audit as representing plaintiff's actual excavating costs and expenses, with certain exceptions, each of which is set forth in defendant's exhibit X, together with the information and facts in explanation thereof. Plaintiff and defendant also agree in this proceeding that the computation and resultant totals as set forth in defendant's audit exhibit X should be accepted and considered, except as to those specific items in this exhibit X designated therein as not agreed to by plaintiff.

It is further agreed between the parties in this proceeding that if plaintiff is entitled to recover on its claim for increased excavation costs over the amount allowed and paid at the original contract price and the change order price, the correct amount is $28,065.23, as set forth in defendant's exhibit X, which amount is exclusive of the $12,375 deducted and withheld by defendant as liquidated damages for delay. The revised total claim of plaintiff now pressed is $71,113.26, including the $28,065.23, *supra*, after eliminating certain costs previously claimed but excluded by defendant's audit and now agreed to by plaintiff. This sum of $71,113.26 also includes the following items totaling $43,048.03, as to the figures of which, as shown on the basis of plaintiff's claims, the parties are in agreement, but not otherwise:

1. Excess payments to Bolz		$5,076.77
2. 10% profit		9,061.91
3. Additional bond premium		363.71
4. Liquidated damages		12,375.00
5. Payment for Henderson Sand & Gravel Sandsucker		960.00
6. Difference in rentals paid to others:		
As computed by plaintiff on basis of 4.3 months	$7,615.20	
As computed by defendant on basis of 2.47 months	4,374.37	
		3,240.83
7. Difference in field office overhead:		
Per plaintiff 4.3 months at $2,041.00	8,776.30	
Per defendant 2.7 months at $2,041.00	5,041.27	
		3,735.03
8. Difference in home office overhead:		
Per plaintiff 4.3 months at $4,499.88	19,349.48	
Per defendant 2.7 months at $4,499.88	11,114.70	
		8,234.78
		43,048.03

35. The provisions of paragraph 6 (b) and (c) of the specifications respecting liquidated damages are as follows:

> (b) In case of failure on the part of the contractor to complete the work within the time thus determined and agreed upon for its completion, the contractor shall pay to the Government as liquidated damages, the sum of $200 for each calendar day of delay until the work is placed in safe and practical operating condition, as determined by the contracting officer, and thereafter the contractor shall pay to the Government as liquidated damages the sum of $25.00 for each calendar day of delay until the remaining work to be performed under the contract is completed and/or accepted.
>
> (c) Should the cofferdam, when constructed to the heights specified and in accordance with paragraph 1–02, be overtopped by high water, an amount of time, equal to that lost by such flooding, will be allowed in addition to the time agreed upon above for completion; provided it is clearly established that such lost time is not due to any negligence on the part of the contractor.

Plaintiff received notice to proceed February 6, 1933. This fixed February 6, 1934 as the date for completion. The contracting officer decided that the lock and dam were placed in safe and practical operating condition on September 13, 1934, and this decision of the contracting officer on the facts was affirmed by the Secretary of War October 23, 1935. These findings and decision were not arbitrary or grossly erroneous. The contracting officer further found and de-

cided that the remaining work to be performed under the contract was completed and was accepted on September 19, 1934, which registered a total delay of 225 days beyond the period specified for completion. Time extensions were allowed by the contracting officer as follows:

Under Change Orders Nos. 2, 3 and 4	87 days
Allowed by the Chief of Engineers on plaintiff's appeal, based on changed conditions, covered by Change Order No. 2	34 "
On account of the flooding of cofferdam	28 "
Pursuant to the provisions of Article 9 of contract	8 "
Total extensions allowed plaintiff under its contract	157 "

The contracting officer decided and held that plaintiff was chargeable with liquidated damages for the remaining 68 days of delay as follows:

61 days at $200 per day	$12,200
7 days at $25 per day	175
Total	12,375

36. January 31, 1934, the contracting officer issued Change Order No. 3 under article 3 of the contract, which was agreed to, accepted and signed by plaintiff February 1, 1934, and approved by the Chief of Engineers March 8, 1934. Pursuant to its provisions an equitable adjustment was made in the entire contract price and time for performance because of the placing by plaintiff of ten concrete reinforcing struts between the concrete wall and the river lock in order to strengthen the foundation, which strengthening was made necessary by reason of the changed subsurface conditions encountered.

January 19, 1934, the contracting officer issued Change Order No. 4, under article 3 of the contract, which was agreed to and signed by plaintiff January 20, 1934, and approved by the Chief of Engineers March 20, 1934. This change order was issued and an equitable adjustment was made in the contract price and time for performance because of the elimination of the refill behind the upper and lower guide walls, due to the unstable condition of the foundation soil.

July 23, 1934, the contracting officer issued Change Order No. 5, under article 4 of the contract, which was agreed to

and signed by plaintiff August 4, 1934, and approved by the Chief of Engineers August 13, 1934. This change order was issued because the excavation material encountered was materially different from that which had been contemplated in connection with the cofferdam for the first dam. This condition made it necessary for the excavation to be carried to a greater depth, and required more work and expense. This change order made an equitable adjustment in the contract price and time for performance by reason of the conditions to which it related.

37. January 29, 1935, the Chief of Engineers, after a hearing granted plaintiff, and after a consideration of information supplied and the contentions made by plaintiff in connection with its appeal from "Change Order No. 2, dated August 30, 1933," and its appeal from denial of payment for removal of slide material because of alleged changed conditions, and for remission of liquidated damages, and after a review of the facts and circumstances with reference to "Change Order No. 2, dated June 7, 1933," "Change Order No. 2, dated July 15, 1933," and "Change Order No. 2, dated August 30, 1933," hereinbefore referred to, wrote the Division Engineer at Cincinnati (that office having been moved from St. Louis) for a full report of the facts with reference to the questions, and his recommendations. This letter is in part as follows:

> 4. The Chief of Engineers approved the redrawn change order dated July 15, 1933, on October 25, 1933. The redrawing of the change order under date of August 30, 1933, and submission thereof to the contractor constituted a counter offer on the part of the United States and a rejection of the change order drawn on July 15, 1933, as accepted by the contractor on July 18, 1933. Nothing can be found in the records to indicate that the contractor subsequent to August 30, 1933, again accepted the change order of July 15, 1933; in fact, the contractor's letter of September 19, 1933, indicated his definite rejection thereof. Therefore change order No. 2 can operate only as a finding of fact to the effect that subsurface conditions materially differing from those shown on the drawings and specifications were encountered.

5. Your findings of facts and recommendations are requested in order that an equitable adjustment of the increased costs suffered by the contractor subsequent to May 1, 1933, due to the changed conditions encountered may be recommended to the Comptroller General for direct settlement, your findings to specifically set forth: first, the additional costs suffered by the contractor subsequent to May 1, 1933, due to the changed conditions stated in change order No. 2 and the additional time required; second, whether or not the sloughing of the banks constituted an additional changed condition not contemplated by the contract and specifications, and if so, the additional costs and time required by the contractor as a result thereof.

38. May 23, 1935, the Division Engineer at Cincinnati prepared for the Chief of Engineers a statement of facts and recommendations regarding the appeal of plaintiff, and in connection with the information supplied and contentions made by plaintiff against the adverse decisions of the District Engineer (contracting officer) as to the questions involved, as follows:

1. The District Engineer [contracting officer] was requested to furnish data and facts to form the basis for the report called for in the above endorsement [Chief of Engineers' letter of January 29, 1935]. Copy of memorandum furnished by the District Engineer in this connection is herewith. In order fully to comply with the requirements of the 2d indorsement, further data were subsequently obtained from the files of the District Engineer. These data, together with the knowledge of the case possessed by certain of the personnel of this office who were in intimate contact with the work during its execution, were utilized to prepare a report in this office which provides the information called for in the 2d indorsement. Prior to the completion of the aforesaid report, a conference was held in this office with the contractor. This conference took place at the contractor's request. The report is inclosed herewith.

2. A summary of the report of this office is as follows:

(a) Due to the changed conditions mentioned in Change Order No. 2, the contractor experienced delays as listed below:

(1) Delay due to change in plan for pile driving for lock walls------------------------------------ 28 days

(2) Delay due to retarded progress in placing concrete in lock walls------------------------------ 10 days

(3) Delay due to excavation of slide material which caved into the lock cofferdam during unwatering	10 days
(4) Delay due to extra fill required to isolate lower guide wall from main cofferdam when contractor was forced to change his plan for construction of the lower guide wall	4 days
(5) Delay due to need for covers for painting lower lock gates	4 days
(6) Delay due to less favorable weather conditions resulting from other delays mentioned above	8 days
(7) Delay due to assembling and conditioning plant to meet the changed conditions	10 days
Total	74 days

All delays listed except (7) were experienced subsequent to May 1, 1933.

(b) The contractor has already been allowed 40 days due to the changed conditions mentioned in Change Order No. 2, and is entitled to an allowance of 34 additional days. At the rate of $200 per day (which was assessed as liquidated damages), the contractor is entitled to $6,800 in this connection.

(c) The contractor suffered costs subsequent to May 1, 1933, due to changed conditions mentioned in Change Order No. 2 amounting to $34,812.03, including such part of his costs in connection with the material which slid into the cofferdam as is properly chargeable to those changed conditions. He also suffered costs directly attributable to the changed conditions prior to May 1, 1933, amounting to $1,085.49.

(d) The contractor has already been paid $18,815.80 on account of the changed conditions mentioned in Change Order No. 2 and is entitled to the difference between this amount and the sum of the items mentioned in paragraphs (b) and (c) above, or is entitled to $23,881.72.

(e) The slide into the cofferdam resulted from the changed conditions mentioned in Change Order No. 2 and was not the result of any further unforeseen conditions. The delays and costs heretofore mentioned include such portions of the contractor's actual delays and costs in connection with the slide as are properly chargeable to the changed conditions mentioned in Change Order No. 2. The contractor's delay on account of the slide was 25 days and his costs $19,804.42. The delay and costs attributable to the changed conditions are 10 days and $15,666.00, respectively.

3. It is recommended that the case be referred to the Comptroller General with the recommendation that pay-

ment of $23,881.72 be made to the contractor in full settlement for the changed conditions mentioned in Change Order No. 2.

The cost of excavating and removing the 18,650 cubic yards of slide material mentioned in paragraph (e) is included in the $34,812.03 mentioned in paragraph (c) above, and the extension of time is included in paragraph (a) (3).

With and as a part of the above-quoted summary of the facts and recommendations of May 23, 1935 the Division Engineer prepared and forwarded to the Chief of Engineers, for consideration of the Secretary of War, a detailed report of the facts in connection with all of the items of plaintiff's claim on appeal.

The amount of $23,881.72 found and recommended by the Division Engineer on May 23, 1935, as above mentioned, was modified in a supplemental finding and recommendation of August 23, 1935, upon the presentation by plaintiff of further information and argument, and an additional amount of $5,041.27 as field office and supervisory expenses was found and recommended.

In considering plaintiff's appeal and claim for increased costs and expenses in the performance of the work called for by the original contract and such contract as changed in the particulars and for the reasons indicated, and for remission of liquidated damages, and in preparing statements of facts and recommendations thereon, the Chief of Engineers and the Division Engineer were acting under and pursuant to authority and instructions of the Secretary of War. Upon consideration, the facts and recommendations prepared and forwarded by the Division Engineer were approved by the Chief of Engineers and submitted to the Secretary of War with the entire record in connection therewith, with a written summary of the facts found and the conclusions recommended as follows:

1. Herewith claim of the Frazier-Davis Construction Company for alleged increased costs in the amount of $66,994.59 incurred due to alleged changed conditions encountered during the construction of Lock and Dam No. 5, Green River, Kentucky, under Contract No. W-559-eng-2991.

2. The contractor notified the contracting officer by letter dated May 1, 1933, that subsurface conditions had been encountered materially different from those contemplated by the contract and specifications. The contracting officer investigated the subsurface conditions and found that they were, in fact, materially different from those described in the specifications and that the contractor was entitled to an adjustment in his contract price as a result of the increased costs resulting therefrom.

3. Under the provisions of Article 5 of the contract, Change Order No. 2 was drawn and dated June 7, 1933, providing for 45 days extension of time and increasing the unit price for excavation from 15 cents per cubic yard to 37.5 cents per cubic yard for an estimated quantity of 107,850 cubic yards. This order was accepted and signed by the contractor, but exception was taken thereto by the Division Engineer. The change order was redrawn under date of July 15, 1933, granting an extension of 40 days in the time for completion of the work and increasing the unit price to 35 cents per cubic yard for material to be removed in the estimated quantity of 110,000 cubic yards. This change order as redrawn was accepted and signed by the contractor, but exception thereto was taken by the office of the Chief of Engineers, and it was returned to the contracting officer without approval. The change order was again redrafted under date of August 30, 1933, allowing 40 days additional time for the completion of the work and an increase of the unit price per cubic yard for material to be removed to 23 cents per cubic yard for an estimated quantity of 110,000 cubic yards. The contractor refused to accept this latter change order when presented to him by the contracting officer and appealed to the Chief of Engineers by letter dated September 19, 1933, said letter being received in the office of the Chief of Engineers on September 29, 1933. In this letter the contractor not only objected to the change order as redrawn under date of August 30, 1933, but also to the provisions of the first two drafts of the order dated June 7 and July 15, 1933, respectively, claiming that his actual costs as demonstrated in the performance of the work, totaled about 60 cents per cubic yard. The contractor requested that the whole matter be reconsidered with a view to further modifying the change order in the light of the information then available as to the actual costs of performing the work.

4. The fact that the letter of protest from the contractor dated September 19, 1933, was a protest against the provisions of the change order in any of its forms was overlooked, and it was interpreted to be a protest of the provisions as drawn under the date of August 30, 1933, only. The change order as drawn under date of July 15, 1933, was approved by the Chief of Engineers on October 25, 1933. The redrawing of the change order under date of August 30, 1933, and the submission thereof to the contractor, requesting his approval, constituted a counter-offer on the part of the United States and thereby a rejection of the change order as drawn on July 15, 1933, as accepted by the contractor on July 18, 1933. The contractor at no time subsequent to August 30, 1933, again accepted the change order as drawn on July 15, 1933; in fact the letter of protest from the contractor, dated September 19, 1933, indicated his definite rejection thereof. It is the opinion of this office that Change Order No. 2 as finally approved by the Chief of Engineers is not binding as to the terms thereof on either party to the contract and can operate only as a finding of fact letter to the effect that subsurface conditions materially differing from those shown on the plans and in the specifications were encountered.

5. The contractor has appealed to the contracting officer and the Division Engineer requesting allowance for additional costs incurred for which he has not received payment under the provisions of Change Order No. 2 as finally approved by the Chief of Engineers. These appeals have been disallowed, and he now appeals to the Head of the Department for a finding of fact under the provisions of Article 15 of the contract.

6. The Division Engineer has made a careful study of the facts and circumstances surrounding the execution of the work and has reviewed all the cost data available in the office of the District Engineer, as well as that of the contractor, and finds, as set forth in the 3rd indorsement above, that subsurface conditions were materially different from those described in the plans and specifications; that the contractor was delayed in the completion of this contract for a total period of 74 days due to these changed conditions; that since 40 days have already been allowed under Change Order No. 2 as approved, the contractor is entitled to remission of liquidated damages for 34 days at $200.00 per day, or the amount of $6,800.00; that the contractor

suffered direct increased costs for the making of the excavation under these changed conditions in the amount of $35,897.52, and that since $18,815.80 has been paid the contractor, in accordance with provisions of Change Order No. 2, the contractor is entitled to the amount of $23,881.72. This amount was further modified by the Division Engineer in his findings contained in 2nd indorsement dated August 23, 1935, on the letter of the contractor presenting further argument in the case, under date of July 6, 1935. Herein the Division Engineer finds that the contractor is entitled to an additional amount of $5,041.27 as field office and supervisory expenses during the period of delay caused by the materially different subsurface conditions encountered.

7. I concur in the findings of the Division Engineer that the contractor did encounter subsurface conditions materially different from those contemplated in the plans and specifications and did suffer delay as a result thereof to the extent of 74 calendar days and increased costs in the amount of $40,938.79. I recommend that the Frazier-Davis Construction Company be allowed the amount of $22,122.99 and the remission of liquidated damages for 34 calendar days, in the amount of $6,800.00, in full settlement of this claim.

October 28, 1935, the Secretary of War approved the findings and recommendations so submitted and adopted them as his findings and decision on plaintiff's entire claim as to the equitable adjustment that should be made under Articles 3 and 4 of the contract for the entire increased costs and expenses of plaintiff in the performance of the original contract and such contract as changed (as hereinbefore in these findings mentioned), and as to extensions of time to which plaintiff was entitled.

The amount of the equitable adjustment found and allowed by the Secretary of War for the increased costs and expenses of performance of the entire contract by reason of the changed conditions encountered over the original contract price was $40,938.79. The amount of such adjustment as computed, estimated, and claimed by plaintiff prior to and embodied in the first "Change Order No. 2, dated June 7, 1933," was $23,287.91, as hereinbefore stated in finding 20. The amount of the equitable adjustment finally determined

and allowed upon the facts by the Secretary of War on appeal by plaintiff from "Change Order No. 2, dated August 30, 1933," in excess of the amount originally estimated, computed, and accepted by plaintiff, was $17,650.88. The additional amount which the Secretary of War found and allowed in excess of the equitable adjustment resulting from the 35 cents per cubic yard increase in the original contract price, as provided in "Change Order No. 2, dated July 15, 1933," was $22,122.99.

39. October 31, 1935, the Chief of Engineers forwarded plaintiff's claim on appeal and the findings and decision of the Secretary of War to the Comptroller General for direct settlement, with the following communication:

> 1. The accompanying claim of the Frazier-Davis Construction Company, for alleged increased costs in the amount of $66,994.59, incurred due to changed conditions encountered in the construction of Lock and Dam No. 5, Green River, Kentucky, under contract No. W-559-eng-2991, is referred for direct settlement by your office.
>
> 2. The Acting Secretary of War has approved the recommendation of the Chief of Engineers that the claimant be allowed the amount of $22,122.99, on account of excess costs, and the remission of liquidated damages for 34 calendar days' delay in the amount of $6,800.00, in full settlement of the claim.
>
> 3. The facts with respect to this matter are fully stated in the preceding correspondence and accompanying papers. * * *

40. December 12, 1935, the Chief of Engineers, through the Chief of the Finance Division of that office, forwarded to the Comptroller General for direct settlement another voucher approved by the contracting officer for $1,600, on account of the refund of liquidated damages deducted in final payment relating to delays caused by high water, which amount the contracting officer and head of the department found should not for the reason mentioned have been charged. This was in addition to the sum of $6,800 previously remitted by the Secretary of War and mentioned in the letter last above quoted.

41. October 30, 1936, the Comptroller General issued his certificate of settlement in the amount of $30,522.99 found

to be due by the Secretary of War, which was paid by check of November 10, 1936. This certificate is in part as follows:

> * * * on account of remission in part of amounts deducted as liquidated damages for delay in completion of construction of Lock and Dam No. 5, Green River, Kentucky, under contract No. W-559-eng-2991, dated January 19, 1933, including amounts deducted for delays caused by floods and amounts deducted for delays caused by excavation of sub-surface material of a different character from that shown by the drawings prepared in connection with said contract; and for additional costs incurred in excavating such sub-surface material under said contract. * * *
>
> Of the total amount claimed, $88,402.37, the sum of $57,879.38 is disallowed for the following reason: The above-named claimant appealed to the Secretary of War for determination of the extent of delays and amount of excess costs incurred by the aforesaid excavation, and the Secretary of War has determined that said claimant is further entitled to $22,122.99 as excess costs, in addition to amounts previously paid; and to remission of liquidated damages for 34 days at the rate of $200 per day, or $6,800. The decision of the Secretary being final and conclusive upon the parties to the contract by the terms of Article 15 thereof, no further amount may be allowed in connection with such excavation, and the balance of the amount claimed in connection therewith accordingly is disallowed.
>
> In addition to the sum of $28,922.99 allowed in connection with the excavation, there is due the contractor the sum of $1,600, for remission of amounts deducted as liquidated damages for delay of 8 days caused by floods. Days for which such remission is made are May 12 to 14, 1933; Jan. 9 to 11, 1934, and March 27 and 28, 1934.

42. November 18, 1936, plaintiff wrote the Comptroller General by registered mail as follows:

> In re: Claim for refund of liquidated damages and excess costs caused by excavation of subsurface material of a different character from that shown by the drawings under contract * * *
>
> Sir: We wish to acknowledge receipt of check in the sum of $30,522.99 under the above claim. We note that you have disallowed the balance of our claim.

> We have previously protested the action of the Administrative Officers of the War Department in refusing to allow the full amount of our claim, and now wish to advise you that we are accepting the amount allowed by your office on account and under protest, reserving all of our rights to further prosecute any and all claims that we may have growing out of and under the aforementioned contract.

Plaintiff held the check for ten days and, not having received a reply to its letter of November 18, cashed the check.

The court decided that the plaintiff was not entitled to recover.

Whitaker, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover additional costs incurred by it due to subsurface conditions which it alleges were materially different from those shown on the drawings or indicated in the specifications. It also seeks ten percent profit on these additional costs. The amount thereof, in excess of the amount already paid, it alleges is $58,738.36. It also seeks to recover $12,375.00 for liquidated damages deducted for delay in completing the work, alleged to have been caused by these unforeseen conditions.

The contract was for the construction of a lock and dam. It provided for the payment of 15 cents per cubic yard for all common excavation. The borings made by the United States Engineer's office indicated that the bed of the river where the lock and dam was to be constructed consisted of loam, loam and clay, sand, sand and clay, and some rock, all of which, except the rock, were classed as common excavation. Plaintiff moved to the site of the work a suction dredge which could have done the common excavation satisfactorily had the materials in the bed of the river been those indicated; but it turned out that this dredge would not remove the materials actually in the bed of the river. Plaintiff undertook to make the necessary adjustment of its machinery to do the work, but was unsuccessful, and finally sublet this part of the work to the Bolz Dredging Company, which had had long experience in river dredging. This company moved to the site a 15-inch electric hydraulic

dredge, but this dredge also was unable to do the necessary excavation. A cutter head was put on it in an effort to make it do the work, and later changes were made in this cutter head, but all without success. Finally, a dragline was resorted to.

On May 1, 1933 (the work had begun on February 12) the contractor wrote the contracting officer that unforeseen subsurface conditions had been encountered and it notified him of its intention to present a claim for additional compensation. The contracting officer directed the plaintiff to make borings in the riverbed to determine the nature of the materials in the bed of the river. When these borings were made it was discovered that the bed of the river consisted of yellow clay mixed with blue gumbo of a tough texture. It also consisted of some hardpan of a sand composition.

Upon discovering this, the contracting officer requested the plaintiff to submit to him its conception of what an equitable adjustment would be on account of these changed conditions. Accordingly, the plaintiff submitted schedules showing a "total loss" of $23,287.91 on account of the changed conditions. Upon consideration thereof, the contracting officer issued "Change Order No. 2, dated June 7, 1933" increasing the amount to be allowed for common excavation from 15 cents a cubic yard to 37½ cents a cubic yard, and allowed 45 days additional time for the completion of the project. This change order concluded as follows:

> This change order, being in excess of $500.00 in amount, does not become effective until approved by the Chief of Engineers.
>
> Therefore, if the foregoing modification of said contract is satisfactory, please note your acceptance thereof in the space provided below.

It was accepted by the plaintiff in these words:

> The foregoing modification of said contract is hereby accepted.

In returning it to the contracting officer the plaintiff wrote him as follows:

> We are returning to you herewith Change Order No. 2 which has been accepted by us.

We wish to, indeed, thank you for the equitable manner in which you have handled this proposition.

The change order was forwarded to the Chief of Engineers, who rejected it because it took into consideration increased costs prior to May 1, 1933, the date upon which the plaintiff had called the changed conditions to the attention of the contracting officer. The contracting officer was, accordingly, directed to revise the change order so as to take into consideration only costs incurred and to be incurred after May 1, 1933. In compliance therewith the contracting officer issued "Change Order No. 2, dated July 15, 1933" reducing the amount to be paid for excavation of "compact clayey materials" from 37½ cents to 35 cents, and reducing the extension of time for completion of the work from 45 to 40 days. This amended change order was accepted by plaintiff on July 18, 1933, in the following words:

> I am returning to you herewith change Order No. 2 which has been altered in accordance with your letter of July 15th and which has been accepted by us.

However, the Chief of Engineers, on the recommendation of the Division Engineer at St. Louis, rejected this change order, and reduced the price to be paid for this excavation to 23 cents per cubic yard. Thereupon, the contracting officer prepared a new Change Order No. 2, dated August 30, 1933, providing for 23 cents per cubic yard, and extending the time for completion 40 days. This change order was rejected by the plaintiff, who advised the contracting officer of its intention to appeal therefrom to the Secretary of War. In its appeal plaintiff not only appealed from the change order dated August 30, 1933, but stated that it had discovered that it had been very unfair to itself in accepting the original change order of June 7, 1933, providing for 37½ cents per cubic yard, and asked that "this whole matter be reviewed and another Change Order be awarded us in the light of the new information now available."

Upon consideration thereof the Chief of Engineers and the Secretary of War decided that the price agreed upon in the change order of July 15, 1933, of 35 cents per cubic

yard, was equitable, and it was, accordingly, approved and sent to the contracting officer for delivery to plaintiff, which was done on November 1, 1933.

At that time plaintiff did not indicate whether it accepted or rejected this change order, but sometime between November 14 and November 16, 1933, plaintiff executed without protest a voucher sent to it by the defendant for $15,588.40 for 77,942 cubic yards excavated between May 1, 1933 and October 31, 1933, calculated at the rate of 35 cents per cubic yard, in accordance with the approved change order dated July 15, 1933. Subsequently, the plaintiff accepted without protest and cashed a check for this amount. Later, in November, December, January, February, March, April, May and June, it executed vouchers based on 35 cents a cubic yard for excavation, and payments were made accordingly, and were accepted by the plaintiff without protest. In a letter to the contracting officer dated December 23, 1933 the plaintiff admitted that it had agreed to the change order dated July 15, 1933 after it had been approved by the Chief of Engineers and the Secretary of War.

This change order constituted a modification of the contract, and as so modified it has been fully performed by the defendant, with the possible exception now to be considered. *Seeds & Derham* v. *United States*, 92 C. Cls. 97, 312 U. S. 697.

During the unwatering of the cofferdam for the lock 18,650 cubic yards of the bank of the excavation caved in and had to be removed by the plaintiff. On November 23, 1933 the plaintiff wrote the contracting officer claiming that payment should be made for excavating and removing this caved-in material. This claim was rejected by the contracting officer. No appeal from this action was taken to the head of the department within the 30 days required by article 15 of the contract, but the plaintiff did advise the contracting officer that it would insist upon being paid for the excavation of this caved-in material; and on February 27, 1934 it made a second demand on the contracting officer therefor. This demand was rejected by the contracting officer on March 8, 1934; and on March 23, 1934 the plaintiff notified him of its

intention to appeal, and on April 3, 1934 it took its appeal to the Secretary of War. Upon receipt thereof the Chief of Engineers and the Secretary of War reconsidered the entire case, not only whether or not the plaintiff should be paid for removing the caved-in material, but also whether or not change order No. 2, dated July 15, 1933, was in fact an equitable adjustment. Upon consideration thereof they concluded that the plaintiff had suffered increased costs in excess of those paid it under change order No. 2 dated July 15, 1933, and they, accordingly, recommended to the Comptroller General, the work having been concluded, that, in addition to the sum already paid, the plaintiff be paid the further sum of $22,122.99 on account of these increased costs, and that the time for completion of the contract be further extended 34 days and, accordingly, that liquidated damages in the amount of $6,800 be remitted.

Later, the Chief of Engineers forwarded to the Comptroller General for direct settlement an additional voucher for $1,600 on account of liquidated damages deducted. On October 30, 1936 the plaintiff was paid the aggregate of these amounts, $30,522.99. The cost of excavating the caved-in material at 35 cents per cubic yard was $6,527.50.

Even though the defendant were obligated to pay plaintiff for the cost of removing the caved-in material, it appears that it has paid it far more than the cost thereof, in addition to the amount due under the terms of its contract as modified by change order No. 2, dated July 15, 1933.

Not only did plaintiff agree to the 35 cents a cubic yard provided for under change order No. 2 of July 15, 1933, but it agreed to the extension of time of 40 days, and it, therefore, cannot complain that liquidated damages for delay in excess of this 40 days have been deducted. However, the defendant has not insisted upon the strict letter of the contract, but, in addition, has remitted liquidated damages for 42 additional days. This it was not required to do, nor was it required to pay plaintiff $22,122.99 more than it had agreed to pay it. The defendant has not only been just to the plaintiff, it has been generous with it. More has been paid under the contract than the defendant was obligated to pay, and

a less amount has been deducted for liquidated damages than might have been deducted had the strict letter of the contract been insisted upon.

We are convinced, however, that under all the circumstances the defendant's representatives have not only acted generously with the plaintiff, but they have been fair to the defendant's interest. The work cost considerably more than the parties estimated when change order No. 2 dated July 15, 1933 was issued, and it was right and proper under all the facts and circumstances of this case that the plaintiff be paid the additional amount paid it on October 30, 1936.

It results that the plaintiff is not entitled to recover. The petition will be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE YANKTON SIOUX v. THE UNITED STATES

[No. D-776. Decided October 5, 1942]

On the Proofs

Indian claims; lands owned by Sioux Indians under treaty of 1851; cession by Yankton tribe under treaty of 1858.—Where the plaintiff tribe, one of the several bands of Sioux Indians, owned an interest in common with the rest of the Sioux in a large area of land described in the treaty of Fort Laramie, September 17, 1851; and where by the terms of said treaty such ownership was confirmed; and where by the treaty of April 19, 1858 (11 Stat. 743) said tribe did cede and relinquish to the United States all lands then owned, possessed or claimed by them excepting a certain 400,000 acres described in said treaty and reserved as a permanent reservation for plaintiff tribe; and where plaintiff tribe was not a party to certain subsequent treaties and agreements relating to the Sioux lands not so reserved to plaintiff tribe in the treaty of 1858; and where plaintiff tribe asserted no interest in or claim to such Sioux lands over a long period of years; it is *held* that whatever interest plaintiff tribe had in said Sioux lands as a consequence of the treaty of 1851 was relinquished by the treaty of 1858, and plaintiff tribe is accordingly not entitled to recover.

Same.—Where from 1858, when by treaty plaintiff tribe in broad language relinquished its claim to all lands theretofore held by it except a specified reservation, until 1924, when the instant suit was filed, plaintiff, so far as the record shows, made no assertion of the claim in suit; it is *held* that it may be reasonably assumed that plaintiff by the treaty of 1858 intended to relinquish whatever interest plaintiff had in the lands now claimed.

Same; failure to assert claim.—Consistent failure to assert a claim on repeated occasions when such assertion would have been the natural action of a claimant resolves whatever ambiguity may have been discerned in the treaty in which the alleged ambiguity is contained.

Same; construction of ambiguous language in Indian treaty.—There is nothing in the doctrine of construing ambiguous language against the party who drafted the instrument, or in the doctrine of construing treaties between the United States and Indians favorably to the Indians, which would justify the Court of Claims in placing a meaning upon an instrument contrary to that which, for some 80 years, the parties to the instrument had themselves placed upon it.

The Reporter's statement of the case:

Messrs. Ernest L. Wilkinson and *John W. Cragun* for plaintiff.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

The court made special findings of fact as follows:

1. This suit is brought by plaintiff band under the jurisdictional act approved June 3, 1920, 41 Stat. 738. The petition was filed September 30, 1924, which was within the time limit prescribed by that act.

2. Early in the nineteenth century the Sioux or Dakotah Indians were divided into two general groups, the Sioux of the Mississippi and the Sioux of the Missouri. The Sioux of the Mississippi were composed of the Sisseton, Wahpeton, Medawakanton, and Wahpekoota Bands of Indians, and the Sioux of the Missouri were composed of the Tetons, Yanktons of the South and the Yanktons of the North (afterwards known as the Yanktonais and Cut Heads, a branch of the Yanktonais) bands of Indians. The

Yankton Sioux Indians, who through their attorney have filed their petition in this case, make up the band of Indians that was known as the Yanktons of the South.

Prior to and in the year 1849 the several tribes of Indians mentioned in the last preceding paragraph were located in the following territory:

The territory of the Medawakanton Band of Indians was entirely west of the Mississippi River and extended from the Iowa line, including the half-breed reservation, north to some 10 or 20 miles above the St. Peters. The Wahpekoota Band of Indians occupied country below and west of the Medawakantons, to the south of the St. Peters, and around the heads of the Cannon and Blue Earth Rivers. The Wahpeton Band of Indians lived north and west of the Wahpekootas and their villages extended far up the St. Peters River toward its sources. To the west and southwest of the two last-mentioned bands was the Sisseton Tribe, which claimed all the country west of the Blue Earth River to the Jacques (James). The Teton Band of Indians lived entirely beyond the Missouri River, their territory extending about Cannonball River and south to the Niobrara River. The territory of the Yankton Band of Indians was next beyond that of the Sisseton Tribe, commencing on the western side of Lake Traverse, and extending west of the River Jacques to the Missouri above old Fort Lookout and to the borders of the land of the Yanktonais. The Yanktonais Band of Indians lived on all that range of country at the heads of the Sioux, Jacques, and Red Rivers, north and west of the Yankton Tribe, nearly to the White Earth River.[1]

3. On September 17, 1851, "at Fort Laramie, in the Indian Territory," a treaty was concluded between commissioners representing the United States "and the chiefs, head men, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and *north of the lines of Texas and New Mexico, viz*, the Sioux

[1] This same finding was made in each of the two earlier proceedings between this plaintiff and defendant in this court. See *The Yankton Sioux* v. *The United States*, 53 C. Cls. 67, 75; *The Yankton Sioux Tribe of Indians* v. *The United States*, 61 C. Cls. 40, reversed, 272 U. S. 351.

or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre, Mandans, and Arrickaras" (IV Kapp 1065). This treaty was signed on behalf of the Sioux Nation by six representatives, among whom was one Maktoe-sah-bi-chis, who at the time was a chief of one of the two or more bands of the Yankton tribe of Sioux Indians. The pertinent portions of this treaty are as follows:

> ARTICLE I. The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace.
>
> * * * * *
>
> ARTICLE V. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:
>
> The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River: thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.
>
> * * * * *
>
> It is, however, understood that in making this recognition and acknowledgment the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.
>
> * * * * *

The territory described as being territory of the Sioux Nation by the *Treaty of Fort Laramie (1851)* embraces lands within the present states of North Dakota, South Dakota, Wyoming, Montana, and Nebraska.

4. On April 19, 1858, in the city of Washington, D. C., a treaty was concluded between a commissioner on the part

of the United States and chiefs and delegates on the part of the "Yancton tribe of Sioux or Dacotah Indians" (11 Stat. 743; 2 Kapp, 586). The portions of this treaty pertinent to the issues herein are as follows:

ARTICLE I. The said chiefs and delegates of said tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit—Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres. They, also, hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the treaty of Laramie, of September 17, A. D. 1851.

ARTICLE II. The land so ceded and relinquished by the said chiefs and delegates of the said tribe of Yanctons is and shall be known and described as follows, to wit

"Beginning at the mouth of the Tchan-kas-an-data or Calumet or Big Sioux River; thence up the Missouri River to the mouth of the Pa-hah-wa-kan or East Medicine Knoll River; thence up said river to its head; thence in a direction to the head of the main fork of the Wan-dush-kah-for or Snake River; thence down said river to its junction with the Tchan-san-san or Jaques or James River; thence in a direct line to the northern point of Lake Kampeska; thence along the northern shore of said lake and its outlet to the junction of said outlet with the said Big Sioux River; thence down the Big Sioux River to its junction with the Missouri River."

And they also cede and relinquish to the United States all their right and title to and in all the islands of the Missouri River, from the mouth of the Big Sioux to the mouth of the Medicine Knoll River.

And the said chiefs and delegates hereby stipulate and agree that all the lands embraced in said limits are their own, and that they have full and exclusive right to cede and relinquish the same to the United States.

*   *   *   *   *

ARTICLE XIV. The said Yanctons do hereby fully acquit and release the United States from all demands

against them on the part of said tribe, or any individual thereof, except the before mentioned right of the Yanctons to receive an annuity under said treaty of Laramie, and except, also, such as are herein stipulated and provided for.

* * * * * *

5. By Treaty of April 29, 1868 (15 Stat. 635, 2 Kappler 770), various tribes of the Sioux and the Arapahoes ceded to the United States a large portion of the lands described as belonging to the Sioux in the Treaty of Fort Laramie of 1851. Plaintiff band did not participate in this treaty.

6. By agreement executed at various dates in 1876 and confirmed by Act of Congress of February 28, 1877, c. 72 (19 Stat. 254, 1 Kappler 168), the various tribes of Sioux other than plaintiff, together with the Northern Arapahoes and Cheyennes, ceded to the United States a large part of the remaining Sioux lands described in the Treaty of Fort Laramie of 1851. Further lands within the Ft. Laramie Sioux area were taken or authorized to be taken by the United States by the Act of March 2, 1889, c. 405, § 21 (25 Stat. 888, 1 Kappler 328, 336) (Proclamation of acceptance by Indians, 26 Stat. 1554, 1 Kappler 943); and others were restored to the public domain and disposed of under the public land laws to homesteaders. A small parcel of land within the Sioux territory recognized by the Treaty of Ft. Laramie of 1851 was also ceded to the United States by Treaty of March 12, 1858, with the Ponca tribe (12 Stat. 997, 2 Kappler 582).

7. Both before and after the treaty of 1858 members of plaintiff band hunted and roamed in the Sioux lands, as recognized by the treaty of 1851.

8. There is no evidence that at any time before this suit was brought plaintiff band protested that its interest in the Laramie lands had been taken. There is evidence that plaintiff complained of receiving less under its treaty than the other Sioux, who had not always been as friendly to the white man as the Yankton Sioux, were receiving.

9. The sum of $132,430.25 was spent for plaintiff out of moneys appropriated by Congress to fulfill provisions of the Treaty of 1868 to which plaintiff was not a party. There was no authorization by Congress of this expenditure.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff is here under a special jurisdictional act of June 30, 1920 (41 Stat. 738), authorizing the Sioux Tribe of Indians or any band of the tribe to sue the United States for any amount due "* * * under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due * * *." The act waives the statute of limitations.

The substance of plaintiff's claim is that it, as one of the several bands of the Sioux, owned an interest in common with the rest of the Sioux, in a large area of land described (see finding 3) in the treaty of Fort Laramie of 1851 and lying within the present boundaries of North Dakota, South Dakota, Nebraska, Wyoming, and Montana; that the treaty of 1851 confirmed the ownership of the Sioux of that land; that by a treaty of April 29, 1868 (15 Stat. 635, 2 Kappler 770) and an agreement of 1877 (19 Stat. 254, 1 Kappler 168), certain bands of the Sioux, not including plaintiff, relinquished to the United States their interest in a portion of that land lying west of the Missouri River; that by an act of Congress of March 2, 1889 (25 Stat. 888, 1 Kappler 328, 336), the United States took the rest of the lands covered by the treaty of 1851, giving to the bands of the Sioux other than plaintiff separate reservations; that plaintiff was not a party to the treaty of 1868 nor the agreement of 1876 and did not relinquish its interest in the land; that nevertheless the United States took the land, including plaintiff's interest, and appropriated it to its own use; that as a result thereof, and of the jurisdictional act of 1920, plaintiff is entitled to recover the value of that interest.

The defense of the United States rests on two grounds; first, that plaintiff and the rest of the Sioux did not have such an interest in the lands in question as to entitle them to compensation upon the taking of the lands by the United

States; second, that whatever interest plaintiff band had as a consequence of the treaty of 1851 was relinquished by it to the United States by a treaty of 1858 made between plaintiff band and the defendant. We consider first the effect of that treaty.

The pertinent provisions of the treaty of April 19, 1858 (11 Stat. 743) are as follows:

> ARTICLE I. The said chiefs and delegates of said tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possesed, or claimed by them, wherever situated, except four hundred thousands acres thereof, situated and described as follows, to wit:
>
> [Here follows a description of the four hundred thousand acres which was intended as a permanent reservation for plaintiff band.]
>
> They, also, hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the treaty of Laramie, of September 17, A. D. 1851.
>
> ARTICLE II. The land so ceded and relinquished by the said chiefs and delegates of the said tribe of Yanctons is and shall be known and described as follows, to wit—
>
> [Here follows a description of a tract of land lying between the Big Sioux and the Missouri Rivers, which land immediately adjoined the four hundred thousand acre tract excepted from the relinquishment and cession of Article I, and which land, together with the land so excepted, had been the territory particularly occupied by plaintiff band.]
>
> And they also cede and relinquish to the United States all their right and title to and in all the islands of the Missouri River, from the mouth of the Big Sioux to the mouth of the Medicine Knoll River.
>
> And the said chiefs and delegates hereby stipulate and agree that all the lands embraced in said limits are their own, and that they have full and exclusive right to cede and relinquish the same to the United States.
>
> ARTICLE XIV. The said Yanctons do hereby fully acquit and release the United States from all demands against them on the part of said tribe, or any individual

> thereof, except the before-mentioned right of the Yanctons to receive an annuity under said treaty of Laramie, and except, also, such as are herein stipulated and provided for.

It is plain, and plaintiff concedes, that the language of Article I, standing alone, would have relinquished plaintiff's here asserted undivided interest in the large tract which was the subject of the treaty of 1851. Whether regarded as an admitted ownership or as a claim, it was included in the cession and release. Besides, the specific reference to the treaty of 1851, saving its annuity rights under that treaty, was an indication that it had in mind, when making the treaty of 1858, its rights under the treaty of 1851, and was expressly saving such of those rights as it did not intend to release. The language of Article XIV was also suitable for relinquishing plaintiff's claim to the land in question, especially if it was regarded as a claim, rather than as an admitted ownership.

Plaintiff relies on Article II. It says that what would otherwise have been the broad effect of Article I was limited and made definite by Article II, when it specifically stated what was ceded and relinquished by Article I, viz., that part of the land up to that time particularly occupied by plaintiff band, which was not retained in plaintiff's new four hundred thousand acre reservation.

The two articles are, on their faces, irreconcilable when applied to the actual situation of the parties. Plaintiff could hardly have said it was ceding and relinquishing "all the lands now owned, possessed, or claimed by them, whereever situated," intending thereby to relinquish only one piece of land whose situation was particularly described, unless it was unaware of or had forgotten its interest in the other piece of land. If that was the case, the language of Article I would still show an intent to relinquish everything else it had, and take a specific four hundred thousand acre reservation. But it had not forgotten the treaty of 1851, since it expressly saved, in the treaty of 1858, its annuity rights under that treaty. We have no knowledge as to how plaintiff ever did regard the treaty of 1851, as to

whether it had conferred upon plaintiff an interest in land, since plaintiff never asserted a claim to such an interest until it filed this suit in 1924.

Plaintiff does not, however, argue that Article II of the treaty of 1858 negatived completely the broad effect of Articles I and XIV. It concedes that plaintiff in that treaty relinquished an interest which it had been vigorously asserting in some lands which several bands of the Sioux of the Mississippi had by two treaties made in 1851 purported to convey to the United States. Thus at least one interest, strongly asserted by plaintiff, not specifically mentioned in the treaty of 1858, and, according to plaintiff's contention here, apparently eliminated from the broad language of release of that treaty by Article II, was intended to be relinquished. This fact contradicts plaintiff's contention as to the intended effect of Article II.

Article II contains, in its last paragraph, quasi-covenants of seisin and of right to convey as to the lands there described. Plaintiff could hardly have given any such assurance with reference to the lands here in question, as to which it now asserts a tenancy in common but leaves in doubt whether each band of the Sioux had an equal share or a share proportionate to the number of its members. There may also have been doubt as to whether plaintiff band had any share at all, or whether the Sioux as a whole had any property interest in the way of an Indian title in these lands. It seems that careless draftsmanship, in allowing plaintiff to limit its assurance of title to the land as to which its title was certain, by language which seemed to contradict that of Articles I and XIV of the treaty, has created the present problem.

As to the construction which the parties themselves placed upon the treaty of 1858, there seems to be no doubt. When ten years later some ten million acres of the lands in which plaintiff here asserts an interest were relinquished to the United States (15 Stat. 635, 2 Kappler 770), the other bands of the Sioux of the Missouri took part in the negotiations for the treaty, but plaintiff band did not, and claimed no right to do so. Its only protests following that treaty were based upon

assertions that that treaty gave more generous consideration to the other bands of the Sioux, most of which had been periodically hostile to the United States, than plaintiff, which had been consistently friendly, had received. When in 1876, a large part of the remaining lands were ceded by an agreement with the United States (19 Stat. 254, 1 Kappler 168), plaintiff was, without protest, omitted from the negotiations. Again, in 1889, when by statute (25 Stat. 888, 1 Kappler 328, 336) the United States took the rest of the land in which plaintiff here claims an interest, and placed the other bands of the Sioux each upon a separate reservation, plaintiff was silent as to its having any interest in the lands taken.

In 1892 plaintiff made an agreement with the United States (28 Stat. 286, 314, 317–319), ceding to it a part of its reservation of 400,000 acres which it retained in the treaty of 1858. There were long negotiations preceding this agreement, and plaintiff's negotiators insisted that plaintiff's retention of the ownership of the Pipestone Quarry in Minnesota should be explicitly recognized in the agreement, as it had been in the treaty of 1858. Again there was no mention of the interest here claimed in the lands to the west.

In 1899 an agreement was negotiated between plaintiff and the United States whereby plaintiff was to cede the Pipestone Quarries.[2] In these negotiations plaintiff refused to sign unless a memorandum of seven specific claims should be submitted to the Secretary of the Interior for his recommendation to Congress. During these negotiations, there was no mention of the claim here asserted.

Thus from 1858, when the treaty containing the broad language of relinquishment was used, to 1924, when this suit was filed, there was not, so far as the record shows, any assertion by plaintiff of the claim here made. We can account for this conduct only by assuming that plaintiff intended, by the treaty of 1858, to relinquish whatever interest it had in these lands. We think that this consistent course of conduct, this failure to assert a claim on repeated occasions when such assertion would have been the natural

[2] Congress did not ratify this agreement.

action of a claimant, resolves whatever ambiguity was injected into the treaty of 1858 by Article II. The various bits of evidence relied on by plaintiff to show that it was not the understanding of the parties that plaintiff had no interest in the western lands do not seem to us to have substantial weight. A letter from a missionary and a polite reply from the Commissioner of Indian Affairs; the fact that $132,430.25 of the money agreed, in the treaty of 1868, to be paid to the other bands of the Sioux was, apparently inadvertently, paid to plaintiff band, to which other payments under other treaties were being made; the fact that members of plaintiff band did some roaming and hunting in the western lands after the treaty of 1858; none of these, or any other evidence relied on by plaintiff is sufficient to cast doubt upon the meaning of plaintiff's conduct which we have recited.

There is nothing in the doctrine of construing ambiguous language against the party who drafted the instrument, or in the doctrine of construing treaties between the United States and Indians favorably to the Indians, which would justify us in placing a meaning upon an instrument contrary to that which, for some eighty years, the parties to the instrument had themselves placed upon it.

In view of our conclusion that plaintiff by the treaty of 1858 relinquished whatever interest it may have had in the lands covered by the treaty of 1851, we do not consider or decide whether the treaty of 1851 gave to the Sioux tribe, or its various bands, including plaintiff, interests which the United States could not later take from them without compensation.

Plaintiff's petition will be dismissed.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

AUSTIN ENGINEERING COMPANY, INC., v. THE UNITED STATES

[No. 43364. Decided October 5, 1942]

On the Proofs

Government contract; construction of buildings at Pearl Harbor Naval Base; delays caused by representatives of Government; liquidated damages.—Where plaintiff, contractor, entered into a contract with the Government to furnish all labor and materials and to perform all work required for the construction of certain buildings at the Naval Operating Base (Hospital), Pearl Harbor, Territory of Hawaii, together with plumbing and electrical systems where specified; and where during the progress of the work controversies arose between the public works officer in charge of the work, representing the Government, and plaintiff's superintendent, such controversies continuing throughout the performance of the contract; and where it is established by the evidence that the action of the Public Works Officer was arbitrary, amounting almost to deliberate obstruction at times; and where it is established by the evidence that the actions of the defendant's officers and employees were the chief causes of the delays in completion of the contract; it is *held* that assessment of liquidated damages for such delays was improper and plaintiff is accordingly entitled to recover.

Same; appeal; notice of decision.—Where considerable sums in excess of the amount provided in the contract were withheld as progress payments; and where final approval and payment was delayed, and the decision of the contracting officer not made for more than a year after the work was completed and accepted; and where plaintiff was not advised of said decision; it is *held* that failure to appeal such decision, of which it had no notice, does not preclude recovery by plaintiff.

The Reporter's statement of the case:

Mr. Edward Gallagher for the plaintiff.
Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized and existing under the laws of the State of New York, with its principal office in New York City.

2. February 3, 1928, plaintiff entered into a contract with the defendant, through L. E. Gregory, Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy, to furnish all labor and materials, and perform all work required for the construction of two quarters for junior officers, two quarters for pharmacists, a nurses' quarters, a garage and storehouse, a laboratory, and an animal house, at the Naval Operating Base (Hospital), Pearl Harbor, Territory of Hawaii, together with plumbing and electrical systems where specified, in accordance with the provisions of Specification No. 5338, as amended by Addendum No. 1 thereto and as contemplated by item 4 (a), paragraph 23–02 thereof, for the consideration of $179,775. By additions to and deductions from the contract work, the contract price was later changed to $180,351.88.

The contract and specifications are plaintiff's Exhibit 1. Additional specifications are plaintiff's Exhibits 2, 3, and 4. These exhibits and all other exhibits mentioned herein are made a part of this report by reference.

3. The contract provided for the work to be commenced within 30 days after date of receipt of notice to proceed, and to be completed within 210 calendar days from the date of receipt of such notice. On February 29, 1928, plaintiff received notice to proceed with the work, and the completion date of the contract was thus fixed as of September 26, 1928. Plaintiff began operations on March 26, 1928. The completion date was subsequently extended to November 17, 1928, at which time the work was 94.9 percent completed.

4. Plaintiff in its amended petition seeks to recover on four separate and distinct causes of action. The proof is insufficient to form the basis for determining the amount of damages in connection with the second, third, and fourth causes of action.

In the first cause of action plaintiff seeks to recover liquidated damages withheld at the time of final settlement for 189 days at $100 per day, and also a balance unpaid.

5. The contract work was accepted by defendant as complete on May 25, 1929. Of the contract price of $180,351.88 plaintiff has been paid $160,882.29. At the time of final settlement the defendant deducted the sum of $19,469.59, of

which $18,900 was for liquidated damages for 189 days at $100 per day, and $50 for violation of a contract labor regulation. Payment of the balance of $519.59 has not been made to the plaintiff.

6. In charge of the contract work on the site for the Government was Public Works Officer, Admiral F. T. Chambers. The superintendent and business agent in charge of the work in Hawaii for the plaintiff was Neil H. Evans. From the beginning of the work there was dissension between the Public Works Officer and plaintiff's superintendent. The Public Works Officer died before any testimony was taken in this case.

7. When the pouring of concrete began a controversy arose between the Public Works Officer and plaintiff's superintendent over the lack of workability of the concrete, the mix of which was supervised by an inspector under the direction of the Public Works Officer, and also over the time demanded by the Public Works Officer for inspection of the placed reinforcing steel before he would permit the concrete to be poured. The controversy became so acute that the superintendent, on June 3, 1928, wired plaintiff's president in New York to come to Hawaii to help in straightening out the difficulty. Plaintiff's president reached Hawaii June 21, 1928, and had conferences with the Public Works Officer. Just what was accomplished by the presence of the plaintiff's president is not clear from the record, except that the pouring of concrete, stopped on June 3, was resumed on June 23.

8. After the pouring of concrete was resumed on June 23, 1928, the concrete work continued to about September 14, 1928, when it was completed, except for "finishing only," but during that time the controversy over the workability of the concrete did not cease. Soon after the work started the Public Works Officer formed a dislike for plaintiff's superintendent, accused him of insubordination, and repeatedly sought his removal. On one occasion he threatened to call out the Marine guards, if necessary, to stop pouring of the concrete. As a result thereof the Public Works Officer did not give plaintiff full cooperation in expediting the progress of the work.

9. Section 28 of specifications 59C2d (plaintiff's Exhibit 4) reads as follows:

> *Consistency.*—Special care shall be given to the quantity of water used. It is the intention to use the smallest quantity of water which will produce a workable mix and secure the densest concrete with maximum freedom from voids. The quantity of water shall be varied to suit the conditions of mixing and pouring, and the proper quantity shall be determined for each condition by suitable tests made by the contractor at the direction of the officer in charge and observed by the Government inspector. The quantities of water for certain conditions once fixed shall be maintained uniform and varied only as necessitated by variations of moisture content in sand or by changed conditions, and only on approval of the Government inspector.

10. The specifications also provided for the amount of cement, fine aggregates, and coarse aggregates to go into the concrete mixes, and over which there was no dispute. The chief bone of contention between the Public Works Officer and plaintiff's superintendent over the concrete was the amount of water that should go into each mix. The superintendent contended that most of the mixes lacked workability because too dry. To get the best results for a job of this kind where the concrete had to be placed among reinforcing steel required a concrete mix with a slump of from 4 to 7 inches, or an average slump of 5 or 6 inches. Of 112 slump tests made during the placing of the concrete 64 of the tests showed a slump of less than 4 inches, some of them less than 2 inches, and a few of them less than 1 inch; the drier the concrete the less the slump.

The Public Works Officer insisted upon a concrete mix that was too dry to secure the best results. The materials available in that area were much more porous than in most continental areas and required a greater amount of water. The attitude of the Public Works Officer in insisting upon too dry a mix caused many difficulties and interfered materially with the progress of the work.

When the forms were removed some of the concrete had voids, known as "honeycombed concrete." These had to be

and were repaired by plaintiff. The superintendent contended that the voids were due to the dryness of the concrete and the Public Works Officer contended that the voids were due to insufficient tamping of the concrete. From the appearance of voids in concrete it cannot be determined whether they were caused by dryness of the concrete or were due to insufficient tamping of the concrete.

11. From the commencement of the contract work to its acceptance as complete covered a period of about 14 months. During the first 8 months the average monthly progress toward completion, as shown by plaintiff's Exhibit 6, a chart prepared by the defendant, was 11.86 percent, making the contract 95 percent complete in November. The average monthly progress toward completion during the last 6 months was only 0.85 percent.

12. Early in January 1929, plaintiff requested inspection for final acceptance. Two Government inspectors went through the buildings and in their judgment the buildings were in shape for acceptance. The Public Works Officer soon thereafter went into the living room of one of the buildings, said it was unfit for human habitation and started to leave. He was urged by the superintendent to point out specifically what was wrong, whereupon he mentioned two or three minor matters. He did not at that time inspect the other buildings. A few days later, after repeated requests, he sent some inspectors over who made a considerable list of defects, most of them minor. Plaintiff corrected these. From time to time other minor corrections were suggested. There were some small oil spots on one of the porch floors which he demanded be removed. Plaintiff desired to do this by removing the topping, which it claims is the usual and only way to remove oil spots. The Public Works Officer refused to permit it to be done in this way, at the same time refusing to suggest any other method of removal. Progress continued slowly. Plaintiff's superintendent then became convinced that because of the feeling toward him by the Public Works Officer the work would not be accepted as long as he remained on the job. February 26, 1929, Superintendent Evans withdrew, and Fred Jordan took over as plaintiff's superintendent with the approval of the Public

Works Officer. At this time the work was practically completed, and in the opinion of Jordan, who was an experienced builder, the buildings were in shape for final acceptance, and only about a week would have been required to make the necessary corrections. Jordan was kept on the job until May 25, 1929, when the work was accepted. Most of this time he put in, with a few helpers, doing maintenance work which was not a part of the contract.

13. March 14, 1929, the two quarters for junior officers were accepted. March 18, 1929, the two quarters for pharmacists and the garage and storehouse were accepted. May 25, 1929, the contract work complete was accepted. If the plaintiff had received proper cooperation from the Public Works Officer the contract work could and would have been ready for final acceptance at least 100 days before May 25, 1929.

14. The pertinent parts of Article 16 of the contract, on partial monthly payments, read as follows:

> (*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.
>
> (*b*) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract: *Provided, however*, That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: * * *

15. In the partial payment for June 1928, the defendant withheld from plaintiff $2,196.36 in excess of the 10 percent on the estimated amount. For September 1928, the defendant withheld from the plaintiff $3,869.44 in excess of the 10 percent on the estimated amount. Plaintiff duly protested, and the Public Works Officer responded that the vouchers were purposely curtailed to cover defects which must be corrected.

16. While the plaintiff and its subcontractors were responsible for a small part of the time consumed in the delays, the chief causes of such delays were the controversies hereinafter referred to, the curtailment of monthly payments and the arbitrary attitude of the Public Works Officer. Except for the period set out in finding 13 the evidence is too general and indefinite to furnish a basis for apportioning the time covered by the various causes of the delay, and no further definite finding can be made in reference thereto.

17. During the progress of the work, and after its completion, the plaintiff filed with the contracting officer, in writing, numerous protests, claims for damages, and demands for extensions of time. After the acceptance of the contract work the contracting officer referred all these matters to the Public Works Officer for report. The public Works Officer made his report to the contracting officer, and on July 9, 1930, the contracting officer made his decision (plaintiff's Exhibit 5), which reads as follows:

> 1. The Bureau approves the recommendations in reference (b), subject to an increase in the time allowance for the repair of the plaster and paint work damaged by blasting operations from 23 days to 45 days. Change "D" is issuing today, further increasing the contract price by $341.88 owing to these repairs, and extending the time 45 days on account of them. This change further finds a delay of 7 days by reason of excessive delay in the delivery to the contractor of reinforcement steel drawings.
>
> 2. The total contract price is $180,351.88, of which by vouchers 1 to 11, inclusive, $160,882.29 has been paid, leaving a remainder of $19,469.59. The liquidated damages for the delay of 241 days in the completion of the work, less the total credit of 52 days mentioned above, amount to $18,900, to which is to be added the penalty for the violation of Article 11 (eight-hour law) of the contract. The preparation and submission of a voucher for the unpaid remainder of the contract price less damages and penalty, together with a release of claims, is authorized. If, as is understood to be the fact, the eight-hour penalty amounts to $50, the amount payable to close the contract is $519.59. Vouchers 12, 13, and 14, heretofore submitted, have not been paid and will be cancelled. The final voucher will accordingly be numbered 12. The

contractor has the right under Article 16 (d) of the contract to except claims from its release.

This decision was made more than a year after the completion and acceptance of the work.

This was an interdepartmental communication. Apparently it was not brought to the attention of the plaintiff and it was not served with a copy. No appeal was taken from this decision.

18. March 24, 1932, plaintiff wrote defendant as follows:

> We are enclosing 1 original, signed, and final release in quadruplicate, executed. However, we are taking exception to the amount of $18,900.00 for liquidated damages and other additions to the contract in accordance with Article 16 (d) of the contract. We have already placed ourself on record in regards to the amount of extra work and liquidated damages as we want to contest those amounts.

Enclosed with this letter were the Final Release dated March 24, 1932, covering various items therein recited "in consideration of the premises and of the sum of Five Hundred Nineteen Dollars and Fifty-Nine Cents ($519.59)"; and the Voucher No. 12—Final. This voucher is dated August 5, 1930, has the plaintiff's signature undated, and the signature of the Chief of Bureau of Yards and Docks dated June 13, 1936.

Copies of the papers here mentioned are respectively Sheets 4, 5, and 1 of defendant's Exhibit 7.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant to furnish all labor and materials and perform all work required for the construction of officers', pharmacists', and nurses' quarters, as well as a garage, storehouse, laboratory, and animal house at the Naval Operating Base (Hospital), Pearl Harbor, in accordance with specifications. The contract price was $180,351.88.

The time for completion was 210 calendar days from the date of receipt of notice to proceed. Notice to proceed was received February 29, 1928, thus fixing the completion date as

September 26, 1928. Due to change orders the time for completion was extended to November 17, 1928.

Plaintiff sues on four separate causes of action. The proof of the amount of damages sustained in reference to the second, third, and fourth causes of action we regard as insufficient to form the basis of a recovery on the part of the plaintiff.

Consideration will be limited to the first cause of action which seeks to recover liquidated damages for 189 days at $100 per day, withheld by defendant at the time of final settlement. There is also a small unpaid balance of the contract price which is conceded by the defendant.

Almost as soon as the work began controversies arose between Admiral F. T. Chambers, Public Works Officer in charge of the contract work, and Neil H. Evans, plaintiff's superintendent. These controversies continued throughout the performance of the contract.

The first controversy arose over the workability of the concrete, the mix of which was supervised by an inspector under the direction of the Public Works Officer, and also over the time demanded by the Public Works Officer for inspection of the placed reinforcing steel before he would permit the concrete to be poured. The Public Works Officer insisted that too much water was being used in the concrete, while plaintiff's superintendent contended that the Public Works Officer would not permit him to use enough water for the type of materials available in the Hawaiian area. The Public Works Officer determined the amount of water that went into the concrete.

The materials available in that area were much more porous than in most continental areas and required a greater amount of water. Even the Government engineers who testified admitted that this was true.

The controversy became so acute that the superintendent on June 3, 1928, wired plaintiff's president in New York to come to Hawaii to help in straightening out the difficulty. Plaintiff's president reached Hawaii June 21, 1928, after an 18-day trip. The pouring of concrete, which had been stopped on June 3, was resumed on June 23, 1928, and was completed about September 4, 1928, except for "finishing only", but during the entire period the controversy over the

workability of the concrete continued to rage. Soon after the work started the Public Works Officer formed a dislike for plaintiff's superintendent and repeatedly sought his removal.

The testimony is overwhelming that the Public Works Officer repeatedly interfered with the concrete mixing and pouring operations and required plaintiff to use less water than was needed, and this attitude and determination on the part of the Public Works Officer caused many difficulties and interfered materially with the progress of the work.

When the forms were removed some of the concrete had voids known as "honeycombed concrete." Plaintiff insisted that this was caused by the Public Works Officer's refusing to permit him to use enough water in the concrete. The Public Works Officer declared that the concrete had not been sufficiently tamped. At any rate, it was necessary that the work be repaired, which plaintiff contended could be done by filling in and smoothing off, but the Public Works Officer insisted that all this concrete be torn out and replaced entirely.

Early in January 1929 plaintiff requested inspection for final acceptance. Two Government inspectors went through the buildings, and in their judgment they were in shape for acceptance. However, when the Public Works Officer thereafter went to make the inspection, he went into the living room of one of the buildings, said it was unfit for human habitation and started to leave. He was urged by the superintendent to point out specifically what was wrong, whereupon he mentioned two or three minor matters and then left without inspecting the remainder of that building or any of the other buildings. A few days later, after repeated requests, he sent some inspectors over who made a considerable list of defects, most of them minor. Plaintiff corrected these. From time to time other minor defects were pointed out, and when corrected still other requirements would be made. There were some small spots on one of the porch floors, the removal of which was demanded. Plaintiff desired to correct this by removing the topping, which it claimed was the usual and only way it knew to remove oil spots. The Public Works Officer refused to permit it to be

done in this way, and at the same time refused to suggest any other method which he would approve.

The work was 95 percent complete in November 1928, but was not accepted for many months thereafter. Plaintiff's superintendent became convinced that because of the feeling towards him by the Public Works Officer the work would not be accepted so long as he remained on the job. On February 26, 1929, he therefore withdrew, and Fred Jordan took over as plaintiff's superintendent, with the approval of the Public Works Officer. At this time the Public Works Officer demanded that the head carpenter be discharged, and Jordan complied.

Jordan testified that at the time he took over the work was 100 percent complete, but that about a week would be required to make the necessary minor corrections that had been suggested. Jordan was kept on the job until May 25, 1929, when the work was finally accepted. Most of this time he put in with a few helpers doing maintenance work, which was not a part of the contract.

The record is replete with evidence of arbitrary action on the part of the Public Works Officer. His lack of cooperation at times amounted almost to deliberate obstruction.

The contract provided that in making partial payments 10 percent of the estimated amount might be withheld until final completion and acceptance of all work covered by the contract. In the payment for June 1928 the defendant withheld $2,196.36 in excess of 10 percent on the estimated amount; in September 1928 the defendant withheld from the plaintiff $3,869.44 in excess of 10 percent of the estimated amount.

When the president of the company was sent for the Admiral stated that he would not listen to them—that they would have to listen to him, and that if they wouldn't listen to him he "would break them as he broke the contractor at the Boston Navy Yard". When asked how it would be done he stated that he would save up all the defects until time for acceptance and then he wouldn't accept the building. This is exactly what he did in this case. Largely in this manner he continued to delay final approval until liquidated damages

of $100 per day had practically eaten up the 10 percent which the defendant had withheld, plus the unpaid balance which defendant concedes. The testimony shows that the customary way is to suggest minor defects as they arise and thus give the contractor an opportunity to correct them as the work progresses.

It is difficult to understand the attitude of the Public Works Officer as it shines through the entire record. It is evident that even his inspectors were afraid to cross him. When plaintiff, not knowing of anything else to be done, so advised the inspectors who had been sent over by the Public Works Officer, and asked for suggestions, the inspector replied that he could not suggest anything, but that he would hate to be in the superintendent's shoes. Another of the defendant's inspectors said they did not dare disagree with the Public Works Officer.

In the state of the record it is impossible to apportion the exact portion of the delay for which each of the parties was responsible, but the evidence is overwhelming that the actions of the defendant's officers and employees were the chief causes of these delays. In these circumstances, it was not proper for liquidated damages to be assessed.[1] In fact, the entire record strongly indicates that if there had been reasonable cooperation on the part of the Public Works Officer and permission for plaintiff to proceed in a normal way with only necessary and proper rulings and requirements on the part of defendant's officer in charge, the work might well have been completed within the time specified in the contract.[2]

Defendant insists that there was no appeal from the decision of the contracting officer, and that therefore plaintiff is not entitled to recover the liquidated damages which were withheld from its contract price. This position is not tenable. Not only were considerable sums in excess of the amount provided in the contract withheld as progress payments, and not only was final approval delayed for several months, i. e., until May 25, 1929, but final payment was de-

[1] *Wharton Green & Co., Inc.* v. *United States*, 86 C. Cls. 100, 109; *Sun Shipbuilding Co.* v. *United States*, 76 C. Cls. 154, 188.

[2] *Ripley* v. *United States*, 223 U. S. 695, 701; *Phoenix Bridge Co.* v. *United States*, 85 C. Cls. 603, 629.

layed for a long period thereafter. The Public Works Officer did not make his report to the contracting officer for almost a year, and on July 9, 1930, the contracting officer made his decision. This was more than a year after the work was completed and accepted. The plaintiff claims that it was never advised of this action by the contracting officer, and therefore had no opportunity for appeal, even if such appeal had been required in the circumstances. The record does not show that the plaintiff was advised of this decision, nor does it show that it was ever furnished with a copy of it. It was in the nature of an interdepartmental communication, and was merely the approval by the contracting officer of a recommendation by the Public Works Officer.

In this state of the record we do not think there was any justification for the assessment of liquidated damages. The plaintiff is entitled to recover the sums so withheld from its contract price; also a balance of $519.59 which was a part of the contract price and which defendant concedes has not been paid. Plaintiff undoubtedly sustained other damages in the way of increased costs of operation, but on these items the proof as to the amount is insufficient.

Judgment will be entered in the sum of $19,419.59. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

McCLOSKEY & COMPANY v. THE UNITED STATES

[43859. Decided October 5, 1942]

On the Proofs

Government contract; temporary heat.—Where a contract required the contractor to provide all necessary fuel, labor, etc., necessary for temporary heating, it is *held* that the contract required contractor to furnish the plant to produce the heat, in view of other provisions of the contract requiring plaintiff to protect against cold the work done.

Same; words and phrases.—The abbreviation "etc." defined.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for the plaintiff.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a Delaware corporation, engaged in the construction business, and maintains its principal office at 1620 Thompson Street, Philadelphia, Pennsylvania.

2. On May 28, 1932 plaintiff entered into a contract with the defendant, represented by Ferry K. Heath, Assistant Secretary of the Treasury, as contracting officer, to furnish all labor and materials, and perform all work required for construction of the superstructure of the Post Office Department building, Washington, D. C., in strict accordance with the specifications, schedules, and drawings, except as noted below, for the consideration of $7,642,000. The foundations for this building had been constructed by plaintiff under a separate contract, which had been completed at the time the contract for the superstructure was entered into.

The contract provided that the work should be commenced as soon as practicable after the date of receipt of notice to proceed and should be completed within 720 calendar days thereafter.

3. Paragraph 25 of the specifications excluded from the work to be done the following, among others:

> *Work not included.*—The following items of work and materials are not included in this contract.
>
> * * * * *
>
> Boilers, stack, oil tanks, and related equipment, as noted on Mechanical Plans.
>
> * * * * *

The contract for the foundations of the building, which had already been constructed, provided places for the boilers of a heating plant, and these places had been provided, but paragraph 2562 of the specifications provided:

> *Steam Service.*—The contractor's attention is called to the fact that certain boiler plant equipment shown on the drawings is future equipment as noted and is not to be included in the contract.

4. Other specifications pertinent to the issues in controversy read as follows:

> 36. The contractor shall be solely responsible for the care and protection of materials or work upon which partial payments have been made and for the replacement of any such materials or work which may be removed, damaged, or destroyed, and he shall not be released from his obligation to supply satisfactory material or work or to replace any which upon subsequent or final inspection may be found not to meet contract requirements in all respects.
>
> 59. *Temporary heating.*—The contractor shall provide all necessary fuel, labor, etc., necessary for the temporary heating of the building, as required to protect all work and materials against injury from dampness and cold, to the satisfaction of the Construction Engineer.
>
> 60. Salamanders or other portable heaters without flues shall not be used within the building except with the approval of the Construction Engineer.
>
> 61. Heating apparatus embraced in the contract may be used for temporary heating, provided it is presented for final inspection in first-class condition, free from all defects.
>
> 63. The contractor shall protect against damage or injury all materials and finished and unfinished work supplied under the contract, all work and materials in place and all property and materials on or about the premises * * *.
>
> 75. *Interpretations.*—The decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final. The Supervising Architect is the duly authorized representative of the contracting officer.
>
> 159. *Protection from cold.*—No concrete or cement work shall be done in freezing weather unless suitable means are used to heat the materials before placing and to protect the concrete after placing so that no damage from frost or freezing shall occur. Protection after placing shall include the use of temporary heat and covering if necessary. No antifreezing ingredient shall be mixed with concrete or cement work.
>
> 517. Masonry shall be protected against freezing and exposed walls shall be covered when leaving off work. No masonry shall be laid in freezing weather unless the materials are so heated or protected, or both heated and protected, that no damage from frost shall occur. The

minimum of protection required shall be to maintain the work after placing at a temperature not below 40 degrees Fahrenheit for not less than 24 hours.

1220. *Plastering.*—The exterior openings shall be kept closed as necessary to properly regulate the drying and curing of the plaster. Plaster shall be protected from rapid drying and from frost. The enclosing of exterior openings during progress of work is included under "Wood work."

5. The provisions of the contract material to the issues raised by the petition read as follows:

> ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.
>
> ARTICLE 10. *Permits and care of work.*—The contractor * * * shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.
>
> ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

6. In the spring of 1933 plaintiff was ahead of schedule in the construction of the building. The progress of the work was such that plaintiff could have postponed the plastering and other work which would require heat in cold weather until the spring of 1934 and have completed the building within the scheduled time. Before proceeding with the plaster and other work requiring heat plaintiff made inquiry to ascertain whether or not heat from the Central Heating Plant, by which means the defendant had determined to heat the Post Office building, would be available by the fall of 1933.[1] No assurances were given plaintiff by defendant's

[1] The contract for the construction of the Central Heating Plant was entered into December 21, 1932, and was to be completed not later than January 1, 1934.

authorized representatives that such heat would be available by that time, but plaintiff concluded that such heat probably would be available, and, consequently, began plastering in the building in June or July 1933. Shortly thereafter, in July or August, the construction engineer in charge of the construction of the Central Heating Plant definitely notified plaintiff that heat would not be available from the Central Heating Plant by the beginning of the heating season.

7. Thereafter plaintiff wrote defendant's construction engineer in charge of the construction of the Post Office building as follows:

> The work of the above building has progressed to the point where we are now ready to erect the finished woodwork and lay the wood floors, and for that reason respectfully call your attention to the fact that in accordance with the terms of our contract paragraph 61 states that we may use for temporary heating the heating apparatus embraced in the contract. Up to now the Government has not furnished any boilers, oil tanks, and stacks which would complete the heating apparatus so that we could use same for heating, nor has the steam service been brought to the building as indicated on drawing HV-100A, which requires that we connect steam service and condensate return to service branches brought to this point under another contract.
>
> Paragraph 59 requires that we provide the necessary fuel, labor, etc., necessary for the temporary heating of the building, which we are prepared to do as soon as you complete that portion of the heating apparatus that is to be let under another contract.
>
> We are sure that you will agree with us that temporary heating should be available not later than October 15, so as to assure everyone concerned that the finished material which we are now about to erect will not be damaged by reason of the building not being kept at its proper temperature.
>
> We will be obliged to you if you will go into this matter and let us know what arrangements you propose to make in order to put this heating apparatus in such shape that it will be available for temporary heating.

Again, on September 13, 1933, plaintiff wrote the construction engineer as follows:

> Under date of August 24th we addressed a communication to you with reference to that portion of the work

which you were to let under another contract which would make available the heating apparatus that we could use. Up to now we have had no written communication from you with reference to this letter, and in view of the seriousness of this emergency situation, it is necessary that we go into the market and purchase the equipment required to make this temporary heat available when needed.

We are very reluctant about taking this stand, but in view of the extreme emergency decided that it was necessary that someone act promptly so that the work already installed and being installed in the completed building will be properly protected, and we wish to notify you that we are installing this work under protest and we will expect to be reimbursed for all expenditures that we are put to by reason of erecting this temporary equipment.

On September 29, 1933, the construction engineer replied as follows:

In association with your contract for the construction of the Post Office Department Building, Washington, D. C., reference is made to your letters of August 24th and September 13th—the tenor of which purport to advance arguments in support of a claim the Government has obligated itself by the phrasing of certain paragraphs in the specifications to provide some form of heat generating apparatus for use by you for temporary heat required to protect the materials of the building while under construction during the coming winter season.

Certain parts of paragraphs 25 and 2562 of the specifications plainly set forth the heat generating apparatus such as boilers, stacks, oil tanks, and related equipment, where shown on the drawings, are not included as a part of your contract and are reserved for future installation.

By these citations the Government has reserved unto itself a right to install this equipment, if and when found desirable, at any date in the future it may select—and, nowhere in the contract is there any reference, direct or inferential, that the installation of this equipment would be made prior to the completion of your contract work.

By the terms of Article 10 of the contract and paragraph 63 of the specifications you are required to assume responsibility for the proper care and protection of all

materials delivered and work performed until completion and final acceptance of the building. No exceptions are made for winter seasons when "Proper care and protection" of some materials, which, by reason of their inherent nature, demand the use of heat to guard against damage from the elements of cold and wet weather conditions.

Supplementing the stipulations of these two citations and in amplification, without detracting from the force thereof, paragraphs 59, 60, and 61 of the specifications require that you furnish "All necessary fuel, etc., necessary for the temporary heating of the building," extends to you a freedom of action in selecting the type and kind of fuel and the method, or appliances, by which the heat is to be generated, other than the inhibitions stated—and provides that in the event you elect to use steam generating equipment for production of heat you are at liberty to use all the heating apparatus embraced in the contract.

The careful review of all the citations noted herein in association with all other related stipulations of the contract leads to a definite conclusion the notice you have served that you are installing the temporary heat generating equipment under protest and expect to submit a claim for reimbursement of all expenditures in regard therewith, is without effect and all such expenditures are a responsibility to be assumed by you under the terms of the contract.

Under these circumstances plaintiff entered into a contract for the construction of a temporary steam generating heating plant, consisting of boilers, stack, oil burners, tanks, and related equipment, which was housed in a rough lean-to shed adjacent to the Post Office building. This temporary heating plant was put in operation on October 19, 1933, and supplied steam for the heating of the building until February 12, 1934, at which time steam from the Central Heating Plant was available and was used thereafter.

The plaintiff was not directed by the contracting officer to install this temporary heating plant, nor was plaintiff given a written order therefor as for an extra, nor was such an order requested by the plaintiff.

8. The costs to the plaintiff of the temporary heating plant were as follows:

Fire bricks	$192.20
Angle irons	24.00
Excavation for tanks	45.00
Boiler insurance	91.25
Cinders	6.00
Electrical work	599.19
Miscellaneous hardware and supplies	33.36
Concrete for foundations	31.20
Labor costs in erection and demolition of boiler shed	491.15
Insurance on pay rolls	12.48
Heating apparatus and installation	12,357.93
Total	13,883.76

After demolition of the plant the only salvage received by plaintiff was by sale of the boilers for $300, which deducted from the total cost of the heating plant leaves $13,583.76, the reasonable cost of the temporary heating plant to the plaintiff.

For extras in the performance of this contract the reasonable overhead was 10 percent, and the reasonable profit was 10 percent.

From October 19, 1933 to February 12, 1934, the cost to plaintiff of fuel oil used for oil burners in the temporary heating plant was $8,928.99.

9. As stated, steam was available from the Central Heating Plant on February 12, 1934, and from that time on the Post Office building was heated by steam so obtained. The defendant demanded from the plaintiff, as compensation for the furnishing of this steam from February 12, 1934 until the time the work was completed, the delivery of 580.55 tons of coal to the Central Heating plant. This the plaintiff did at a cost of $2,953.58. It appears, however, that the cost to the defendant of furnishing plaintiff steam from February 12, 1934 to the completion of the work greatly exceeded the sum demanded of plaintiff.

10. Plaintiff continued to press its claim for the cost of this temporary heating. It was finally rejected on November 23, 1934 by the Assistant Director of Procurement. Prior thereto the office of Supervising Architect of the Treasury had been abolished and its functions with respect to the construction of public buildings had been transferred to the Pro-

curement Division of the Treasury Department under an order of the Secretary of the Treasury, approved by the President, and the Director of Procurement succeeded to the duties of the Supervising Architect, and was authorized to supervise all construction contracts which formerly had been signed by the Secretary or the Assistant Secretary of the Treasury.

11. No appeal was taken by plaintiff to the head of the department from this rejection of its claim by the Assistant Director of Procurement.

The court decided that the plaintiff was not entitled to recover.

Whitaker, *Judge*, delivered the opinion of the court:

In the construction of the Post Office Department building in the city of Washington, D. C., it was necessary to keep the building heated to prevent the plastering, masonry, etc., from freezing. To do this the plaintiff constructed a temporary heating plant. It sues for the cost of constructing it and for the cost of operating it above the cost of the fuel and the labor necessary to operate it. It says that the defendant was under the obligation to furnish the necessary appliances for the furnishing of the heat, and that the extent of its obligation was to furnish the fuel and labor necessary to produce the heat. It bases its claim on the provisions of article 59 of the specifications, which reads:

> The contractor shall provide all necessary fuel, labor, etc., necessary for the temporary heating of the building, as required to protect all work and materials against injury from dampness and cold, to the satisfaction of the Construction Engineer.

It is nowhere explained what the parties intended by the use of the abbreviation "etc." The plaintiff disregards it altogether and says that the extent of its obligation was to furnish the fuel and labor necessary to produce the heat. The defendant says that its obligation was to furnish whatever was necessary to produce this heat, which would include, of course, the appliances, such as boilers, pipes, etc.

When the building was originally planned the defendant apparently intended to heat it with a heating plant to be

installed in the basement under another contract. The plans for the foundation made provision for places in which boilers could be installed. Plaintiff knew this, and when entering into the contract no doubt assumed that this equipment would be available to furnish the temporary heat necessary; but nowhere in the contract does the defendant assume the obligation to furnish the equipment for the production of temporary heat.

Some time after the contract was entered into plaintiff learned that the defendant had abandoned its intention to install a heating plant in the basement and had let a contract for the building of a central heating plant designed to furnish heat for the Post Office building and other Government buildings, and it made inquiries to ascertain whether or not heat from this heating plant would be available in time to protect the plastering, etc., from freezing. Plaintiff says Mr. Melick, the construction engineer, told it to inquire about this at the Treasury Department, and that upon doing so Mr. Martin, one of the assistants to Mr. Heath, Assistant Secretary of the Treasury and the contracting officer, assured it that there was no question but that it would get heat from the Central Heating Plant by October or November. Mr. Martin denies this. He says he could not have given it this assurance because it concerned a matter beyond his ken. He says such assurance could have come only from the construction engineer in charge. The construction engineer in charge was Mr. Melick, who was also the construction engineer on the Post Office building. He says unequivocally that he gave it no such assurance. He says he knew it could not be put in operation by that time and, therefore, he could not have given it any such assurance. Indeed, the plaintiff does not claim that he did.

The contract for the construction of this heating plant provided for its completion not later than January 1, 1934, which was quite some time after temporary heat would have been necessary if plaintiff decided to proceed with the work of plastering during the winter months.

Plaintiff has not carried the burden of showing that such assurances were given. We are satisfied that they were not given by any authorized person.

We do not decide what the effect would have been had such assurances been given.

There was nothing in the contract from which plaintiff could have understood that this heat would be available. When the contract was drawn it had not been determined to heat the Post Office building with heat from a central heating plant.

Plaintiff's position finds support alone in the words of the above-quoted provision of the specifications requiring it to "provide all necessary fuel, labor, etc., necessary for the temporary heating of the building." The extent of the obligation imposed upon plaintiff by this article of the specifications is uncertain. Looking alone at the words, "all necessary fuel, labor, etc.," it is difficult to determine what the parties meant; but there are other provisions of the contract which place upon the plaintiff the absolute duty to protect the work from damage from cold or otherwise. Article 36 of the specifications provides:

> 36. The contractor shall be solely responsible for the care and protection of materials or work upon which partial payments have been made * * *.

Paragraph 63 required that—

> The contractor shall protect against damage or injury all materials and finished and unfinished work supplied under the contract, all work and materials in place and all property and materials on or about the premises * * *.

Paragraph 159 provides for the protection of concrete from frost or freezing, and expressly provides that this protection "shall include the use of temporary heat." Section 517 provides that "No masonry shall be laid in freezing weather unless the materials are so heated or protected, or both heated and protected, that no damage from frost shall occur. The minimum of protection required shall be to maintain the work after placing at a temperature not below 40 degrees Fahrenheit for not less than 24 hours." Section 1220 provides that "Plaster shall be protected from rapid drying and from frost." Article 10 of the contract provides:

> The contractor * * * shall be responsible for the proper care and protection of all materials delivered

and work performed until completion and final acceptance.

What appliances the contractor was to use to furnish this heat was not specified, except that section 60 prohibited the use of "salamanders or other portable heaters without flues" without the consent of the construction engineer. From this exception it is to be clearly implied that the contractor was to furnish the necessary appliances to produce the heat, if they were not otherwise available.

A reading of the contract leaves no doubt that the duty was on the contractor to furnish the necessary heat to keep the work from being damaged by cold. When the contract was drawn it was probably contemplated by the parties that the equipment for permanently heating the building might be available for the furnishing of temporary heat, and, if so, the contractor was permitted to use it under certain conditions, as set out in paragraph 61 of the specifications; but nowhere in the contract is there found an obligation on the part of the defendant that this or other heating equipment would be available in time to furnish the necessary temporary heat. In the absence of such an undertaking, we must conclude that the obligation of the plaintiff to furnish this temporary heat included the obligation to furnish all the instrumentalities and appliances necessary to create the heat and to disseminate it.

Certainly, the provisions of article 59 of the specifications requiring the contractor to "provide all necessary fuel, labor, etc.," is not an express limitation upon its obligation to furnish everything necessary. The abbreviation "etc." is broad enough to include all things "necessary for the temporary heating of the building." The abbreviation is translated "and so forth," "and other things," "and the rest." If we substitute any one of these expressions for "etc.," the contract would read, "all necessary fuel, labor, and so forth, necessary for the temporary heating of the building"; or "all necessary fuel, labor, and other things necessary for the temporary heating of the building"; or "all necessary fuel, labor, and the rest necessary for the temporary heating of the building." Cf. *Wagner* v. *Brady*, 130 Tenn. 554; *L. & N. Ry. Co.* v. *Berry's Adm.*, 96 Ky. 604; *Shuler* v. *Dutton*, 75

Ia. 155; *Gray* v. *Central R. Co. of N. J.*, 11 Hun. (N. Y.) 70; *Potter* v. *Borough of Metuchen*, 108 N. J. L. 447; *Muir* v. *Kay*, 66 Utah 550. It must be so construed, in view of the absolute requirement on the contractor to protect the work from cold.

Since the defendant did not assume the obligation to furnish the necessary appliances to produce the temporary heat, and since there was a definite obligation on the contractor to furnish this temporary heat, we must hold that the plaintiff is not entitled to recover for the cost of doing that which the contract required it to do.

It results plaintiff's petition must be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

B–W CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 43925. Decided October 5, 1942]

On the Proofs

Government contract; change order.—A change order constitutes modification of contract. *Griffiths* v. *United States*, 74 C. Cls. 245; *Seeds & Derham* v. *United States*, 92 C. Cls. 97.

Same; decisions of head of department; contracting officer.—Whether or not contracting officer was in error in rejecting article supplied, because not complying with the specifications, is a question of law, the ruling on which by the head of the department is not conclusive.

Same.—Decision of contracting officer final on question of fact in absence of appeal, although head of department, on later appeal, ruled contracting officer was in error in conclusion reached.

Same; delays caused by defendant, damages for.—Defendant not responsible for delays incident to deciding whether or not to adopt change suggested by plaintiff.

Same.—Defendant not responsible for delay due to furnishing inadequate equipment which it was not required to furnish, but of which plaintiff availed itself.

Same; liquidated damages; extensions of time.—Decision of head of department on liquidated damages and extensions of time final and not subject to review by Comptroller General.

Same.—Decisions of contracting officer and head of department granting extensions of time entitled to every reasonable presumption of correctness.

The Reporter's statement of the case:

Mr. Dean Hill Stanley for the plaintiff. *Mr. Joseph R. McCuen* was on the briefs.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Messrs. Grover C. Sherrod* and *Newell A. Clapp* were on the briefs.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois.

2. On September 7, 1932, the plaintiff entered into a contract with the Department of the Interior, Saint Elizabeths Hospital, Washington, D. C., to "furnish all labor and materials, and perform all work required for constructing and finishing complete at Saint Elizabeths Hospital, Washington, D. C., one Male Receiving Building, * * * also moving, relocating, and remodeling of shops building and Tuberculosis Buildings Nos. 1, 2, and 3, * * * all in strict accordance with the specifications * * *," for the consideration of $599,500.

The contract was signed on behalf of the defendant by M. Sanger, Assistant to the Superintendent of Saint Elizabeths Hospital, as contracting officer. The head of the department concerned was the Secretary of the Interior.

3. The plaintiff has been paid the contract price, as amended by change orders, less liquidated damages deducted. It seeks to recover (1) the cost of additional structural concrete and reinforcing steel due to a redesign of the building after the contract was entered into; (2) damages due to delays; and, (3) liquidated damages withheld at the time of final settlement.

4. Under the contract work was to be commenced within five calendar days from the date of the signing of the contract, and was to be completed within 300 calendar days thereafter, which made the time of completion July 9, 1933.

Work was commenced September 12, 1932. Because of delays, hereinafter mentioned, the work was not completed until April 9, 1934.

5. On the day following the signing of the contract plaintiff suggested to the contracting officer that a two-way joist system be used in the building instead of the one-way system shown on the contract drawings. The two-way system had been designed and patented by plaintiff's consulting engineer. Its use was proposed in order to eliminate many of the columns in the corridors of the receiving rooms and the dining room in the proposed Male Receiving Building.

The contract drawings had been prepared in the Veterans' Administration. Its engineers were unfamiliar with the two-way joist system, but the superintendent of the hospital was interested in eliminating as many columns as possible and asked plaintiff to submit a preliminary design to accomplish this purpose. This plaintiff agreed to do. Accordingly, plaintiff on the same date (September 8, 1932) wrote a letter to the contracting officer designating the columns that could be eliminated by the use of this system. This letter reads as follows:

> In connection with our contract for constructing the Male Receiving Building and referring to our conversation with respect to the removal of certain columns, you are informed that by using what is termed the two-way system of reinforcing in lieu of the one-way system in the plans and specifications, we can eliminate the free-standing columns as well as the many other columns enumerated below. The columns that we suggest be eliminated are the following:
>
> 26, 38. 51, 70, 90, 110, 130, 145, 154, 162, 19, 31, 44, 59, 79, 99, 119, 138, 151, 159, 102, 103, 104, 105, 106, 107.
>
> Eliminate the following columns on all floors above the ground floor:
>
> 92, 93, 112, 113, 14, 15, 10, 11, 76, 77, 96, 97.
>
> We cannot make a detailed estimate of the difference in cost this change will entail; however, it will not exceed Twelve Hundred Dollars ($1200.00). Should you also want eliminated above the ground floor columns 34, 35, 124, and 125, there will be an additional cost not exceeding Eight Hundred Dollars ($800.00).

In doing this the floors will have the same load-bearing capacity and in certain rooms the ceiling height will be increased four inches (4″). The ceiling height will not be lowered in any of the rooms, but in the rooms with the longer span will be the same as at present. There will be a definite increase in usable floor space by eliminating free-standing columns and those which project into rooms. The materials used will be identical with that now contemplated. Some of the footings will be changed in dimensions; however, the structure insofar as the interior space is concerned or the outside walls will be in no way changed other than herein noted.

It will take us two weeks to draw the detailed plans and specifications necessary for these changes. Upon the present basis, we should start pouring concrete about October 1st. Therefore, if final approval of our proposal, including details, is delayed beyond that date, a corresponding extension of time will be required.

In reply the contracting officer wrote plaintiff on the same day a letter reading as follows:

In reply to yours of September 8th, in reference to eliminating columns in Male Receiving Building, at Saint Elizabeths Hospital, the suggestion made by you receives favorable consideration, subject to further conferences between technicians of the hospital, Veterans' Administration, and your Company. Based upon results of such a conference, as agreed upon at the conference at the hospital on September 8th, we would be glad to advise you further.

6. Between this date and September 30, 1932, a number of further conferences were held between plaintiff and defendant's representatives, finally culminating in a definite proposal by plaintiff dated September 30, 1932, which reads as follows:

Following the conference in Dr. White's office on September 27th, myself and associates conferred with representatives of the Veterans' Bureau on September 28th where agreement was reached as to the best solution of the problem before us, with the conclusion that the structural elements could be competently met; this has now become a matter of detail which our engineers are preparing but subject to such modification as the Veterans' Bureau might require.

The object to be reached was to remove certain columns and to give as great ceiling height as possible in conformity with sound architectural practice. This applied particularly to the 1st, 2nd, 3rd and 4th floors, and more particularly to certain rooms on those floors.

By reference to the contract drawings it will be observed that the ceiling height of all rooms on the 1st, 2nd, 3rd, and 4th floors is uniform, and is 9′–11″, and in our solution with particular reference to ceiling heights the following is accomplished:

Basement—No Change.

Ground Floor—Additional ceiling height of 1¾″ throughout except possibly where there is furring for pipes for toilets, where the ceiling height will remain as shown at present.

1st, 2d, 3d & 4th Floors—There will be a gain of 2¼″ throughout making the ceiling height 10′–1¼″ in the rooms where the free standing columns are removed. Elsewhere throughout there will be a gain of 7¼″ or a ceiling height of 10′–6¼″ except possibly where there is furring for pipes for toilets, where the ceiling height will remain as shown at present.

5th Floor—No change in ceiling height.

Where pipes appear, a false beam or false pilaster or other furring will be used as may be necessary to conceal pipes.

To accomplish the foregoing two additional courses of brick will be inserted above the windows of the 1st, 2nd, 3d, and 4th stories. Our estimated cost of this structural work is Eight Thousand Dollars ($8,000.00).

In our letter to you of September 8th we gave you our estimated cost in connection with the removal of certain columns, from which it will be observed that that cost is Sixteen Hundred Dollars ($1,600.00); therefore our estimated, entire cost for making the changes is Ninety-Six Hundred Dollars ($9,600.00); the attached memorandum serving as a basis of said cost.

This proposal was accompanied by a memorandum of the same date, which reads as follows:

The redesign consists of adding two brick courses between the top of the windows and ceiling of the 1st, 2nd, 3d, 4th stories. This is an addition in height of approximately 5½″ for each story. Interior tile partitions to go to underside of joists on 1st, 2nd, 3d, 4th, and Ground floors. Ceilings on 1st, 2nd, 3rd, 4th, and

Ground floors to be brought up to underside of joists, except wherever necessary to conceal pipes there will be used false beams, false pilasters or other furring. The following columns and footings shown on original plans to be eliminated:

26, 38, 51, 70, 90. 110, 130, 145, 154, 162, 19, 31, 44, 59, 79, 99, 119, 138, 151, 159, 102, 103, 104, 105, 106, 107.

On floors above the Ground floor the following free standing columns to be eliminated:

92, 93, 112, 113, 14, 15, 10, 11, 76, 77, 96, 97, 124, 125.

There are to be no changes in architectural features, openings or any mechanical installations except details such as increasing risers for stairs proportionately, and other details necessarily brought about through increasing the four story heights and removal of the columns.

On the basis of this memorandum our proposal for the changes is Ninety-Six Hundred Dollars ($9,600.00).

7. Following this the defendant issued change order No. 1, dated October 11, 1932, which was accepted by plaintiff. It read in part as follows:

Eliminate certain columns to be designated when and if the contractor submits acceptable plans and methods to accomplish the desired result. Conditions prerequisite to the consideration of such plans and methods and specifications being:

1. The maintaining of ceiling heights at not less than that shown on the contract drawings.

2. The contractor to assume all responsibility for the completion of all parts of the contract covering Item 1—General Construction—in accordance with the terms of the contract between the B-W Construction Co. and the Department of the Interior, dated September 7, 1932, without any change in contract time or price other than that determined fair and equitable after an analysis of the proposed changes by comparison with the present contract drawings and specifications has been made and agreed upon between the Department of the Interior and the B-W Construction Co. The additional cost, if any, not to exceed $8,600.00.

* * * * *

8. Following the issuance of the Change Order the contracting officer wrote plaintiff a letter on October 17, 1932, the first paragraph of which reads as follows:

A copy of Change Order No. 1, approved by the Secretary of the Interior, was handed to your representative on the 13th inst., and it is hoped that you will be able to submit acceptable detail structural plans to accomplish this change at an early date. In connection with this matter your attention is invited to the following prerequisites for such submissions: (In the event that any of these requirements are not fully met, a reason for failure to submit same must accompany your submission and this reason must satisfy us as to its justification.)

[Then follow 24 directions required to be shown on the structural plans.]

Between this date and November 18, 1932 the engineers of the plaintiff and defendant held a number of conferences on plaintiff's proposed drawings. Finally, on November 18, 1932, plaintiff wrote the contracting officer transmitting final drawings. This letter reads as follows:

> We hand you herewith tracings for the structural drawings, numbers 105 to 114, inclusive, covering the redesign of the structure for the Male Receiving Building at St. Elizabeths Hospital.
>
> Referring to our letter of October 26, 1932, regarding the slope of the sides of the pans, on drawing number 112 we have made a note which definitely fixes this slope in accordance with the way the structure is to be built.
>
> We will greatly appreciate anything you can do to expedite formal approval of these drawings in accordance with the provisions of Change Order No. 1.

These drawings were approved by the defendant on November 29, 1932, and the contractor was notified thereof on December 5, 1932.

9. Following the approval of plaintiff's proposed plans, plaintiff on December 15, 1932 wrote the contracting officer as follows:

> Referring to Change Order No. 1, and the conference held in your office this morning, you are advised that the estimated cost in the change in design as outlined in our letter to you of September 8, 1932, and of the additional cost brought about by the additional story heights, all of which is contemplated in the Change Order, is Eighty-six Hundred Dollars ($8,600.00), and

we ask that the cost incident to Change No. 1 be fixed at Eighty-six Hundred Dollars ($8,600.00).

10. On January 3, 1933 plaintiff wrote the contracting officer another letter reading as follows:

> On September 27, 1932, we forwarded you the revised schedule of costs for the Male Receiving Building. The amount of Change No. 1, Eighty-six Hundred Dollars ($8,600.00) is broken down as follows:

3. Concrete work	$2,000.00
4. Brick and tile (masonry)	4,000.00
16. Plastering	250.00
21. Painting	750.00
Redesign	1,600.00
Total	8,600.00

11. The contracting officer replied to this latter letter on January 7 as follows:

> Replying to your communication of January 3d, containing a break-down of costs in connection with Change Order No. 1, it is suggested that the following figures be used in lieu of those contained in your communication:

Concrete	$2,000.00
Masonry, including brick, tile, and stone	2,500.00
Plastering	250.00
Painting	750.00
Pipe trades, ornamental iron, stairs, & misc	1,500.00
Labor, materials, and redesigning reinf. concrete in connection with columns omitted; also costs incidental to same	1,600.00
	8,600.00

> It will be necessary that work accomplished in connection with this Change Order be carried separately instead of being consolidated with the original cost schedule. Payments can be made on this Change Order on the completion of the various parts or subdivisions noted above.

On January 11, 1933, the contracting officer wrote plaintiff approving its estimate of $8,600 for doing the work embraced in Change Order No. 1. The first paragraph of this letter reads as follows:

> Replying to your communications of December 15th with respect to Change Order No. 1, you are advised the additional cost that you estimate of $8,600.00 for this additional work and materials to be placed is approved.

12. The original structural drawings, which were a part of the contract entered into by the contractor and the defendant in September of 1932, called for an estimated 5,486 cubic yards of reinforced concrete and 436.7 tons of reinforcing steel. The structural drawings which were agreed to by the contractor and the defendant on November 29, 1932, pursuant to Change Order No. 1, and in accordance with which the Male Receiving Building was constructed, required an estimated 5,692 cubic yards of reinforced concrete and 499.3 tons of reinforcing steel.

Actually 5,752 cubic yards of reinforced concrete were used in constructing the building in question—an increase of 60 cubic yards over the estimated required amount.

13. During the course of construction, the contractor made no claim it was being required to furnish more reinforced concrete and reinforcing steel than was required by Change Order No. 1; but after completion of the building and after defendant had taken it over, plaintiff, for the first time, on July 10, 1934, submitted to the Department of the Interior with the papers for final settlement a claim for 867 extra cubic yards of reinforced concrete at $7.00 per cubic yard, and 170 extra tons of reinforcing steel at $52.00 per ton, in the aggregate sum of $18,071.35, including 10 per cent for overhead and 10 per cent for profit. This claim was denied by the contracting officer, and, on appeal, by the head of the department.

The proof fails to show that more work or material was required of plaintiff than was called for by Change Order No. 1.

No order in writing for any materials in excess of those estimated to be necessary in carrying out Change Order No. 1 was ever given by the contracting officer or his duly authorized representative.

14. The contract was completed on April 9, 1934, 274 days after the date of completion as fixed in the contract. Plaintiff made a number of applications for extension of time. The head of the department allowed a total of 299 days. The contracting officer made no assessment of liquidated damages against the plaintiff, but the Comptroller General deducted 32 days from the total extensions allowed.

by the contracting officer, and assessed against plaintiff liquidated damages for 7 days at $175.00 a day, or a total of $1,225.00.

15. The head of the department held that the defendant had delayed plaintiff in the performance of the contract a total of 123 days. The plaintiff claims damages therefor as follows:

	Time extensions allowed in days
(c) Defendant's failure promptly and within a reasonable time to approve plans for changes desired by defendant in the design of the building	52
(d) Defendant's order stopping the pouring of footings	8
(e) Defendant's failure promptly and within a reasonable time to make changes in the specifications desired by it for relocation of louver outlet in the east wall of the penthouse	1
(g) Defendant's failure promptly and within a reasonable time to approve linoleum which accorded with contract requirements	57
(m) Defendant's failure promptly and within a reasonable time to approve lathing material submitted by plaintiff which was in accord with contract specifications	5
Total	123

16. In addition to the foregoing number of days of delay alleged to have been caused by the defendant, the plaintiff claims the defendant delayed it an additional 9 days. Eight of the nine days it claims was caused by defendant's delay in deciding whether or not to change the plastering material. The plaintiff had proposed to the defendant that they use a different type of plastering, first, because it could not secure from the manufacturer of the type specified the guaranty required by the specifications; and, second, because it thought the one proposed was better than that specified. The plaintiff submitted its suggestion for this change on August 25, 1933. On September 1 the defendant inquired of plaintiff what credit would be allowed if the proposed substitution were adopted, and asked for information as to comparable installations in the immediate vicinity of Washington. The plaintiff furnished this information on September 6. On September 19 defendant declined to make the change suggested. The proof does not show that in the meantime the plaintiff made any further request for a decision on its proposed change.

The head of the department ruled that the defendant was not responsible for whatever delay was caused on account of this proposed change in the type of plaster.

The defendant did not cause plaintiff any delay in carrying out its contract on account of this suggested change in the type of plaster.

17. The remainder of the 9 days' additional delay claimed by the plaintiff to have been caused by the defendant consists of a delay of one day alleged to have been caused by the defendant in stopping the laying of terrazzo.

The contracting officer ruled that the defendant was not responsible for any delay on this account.

The extent of the delay, if any, caused by the plaintiff is not satisfactorily shown by the proof.

Defendant's inspector stopped the work of laying the terrazzo because he was not satisfied with the grouting upon which the terrazzo was to be laid. The plaintiff, however, was able to convince the inspector that the grouting was as it should be; whereupon, the work proceeded as originally planned.

The defendant caused plaintiff no delay on this account.

18. The other item of additional delay claimed by the plaintiff is admitted by it to have run concurrently with the foregoing items. It consists of 4 days' delay caused by defendant's alleged failure to provide heat as required by the contract.

Paragraph G-33 of the specifications reads as follows:

> The temporary heat may be obtained by connecting the radiators for the buildings to the present lines of the heating system at the hospital at such points as designated by the superintendent. All connections shall be made by the contractor at his own expense, but the necessary steam for heat will be furnished by the Government after the building is fully inclosed, at no expense to the contractor.

In December 1933 defendant stopped the varnishing work in the building because the temperature was below 70° Fahrenheit. Plaintiff insisted then and insists now that the inadequacy of the heat was due to the installation by the defendant of a main from the heating plant to the building which was only two inches in diameter. Defendant insisted

that this main was sufficiently large to supply adequate heat. The controversy lasted over ten days or two weeks, when the plaintiff asked permission to install a six-inch main. Instead of granting plaintiff permission to do this, defendant itself installed such a main. Thereafter the proper temperature was maintained in the building without difficulty.

The head of the department, on appeal, made the following finding with reference to this controversy:

> The hospital provided a 2″ pipe from its lines to a place three feet from the building and the contractor connected with this pipe and received steam from the hospital's plant. On December 4, 1933, the contractor was notified that he was not maintaining the temperature of the building at 70° as required by the specifications. He replied contending that sufficient steam for this purpose could not be obtained through a 2″ pipe. This was vigorously denied by the hospital officials. However, on December 20, 1933, the contractor was notified that a 6″ pipe had been installed. December 22, 1933, the contractor connected with this pipe and thereafter the temperature requirements were observed.

Defendant was not responsible for the delay occasioned by the inadequacy of the heat in the building.

19. Plaintiff claims damages for the delay in its performance of the contract found by the head of the department to have been caused by the defendant, as set out in finding 14. Item (c) is a delay of 52 days alleged to have been caused by the defendant's failure to promptly approve plans for changes in design of the building.

The building was completed on July 24, 1934. Thereafter, on November 5, 1934, the head of the department made findings of fact on plaintiff's appeals from the various rulings of the contracting officer. With reference to this item he held:

> The contracting officer has recommended for allowance, and the contractor agrees, that additional time for completion of the work to the extent of 148 days should be allowed. The following is a list of causes of such delay:
>
> * * * * *
>
> December 15, 1932:
> Redesign, Change Order No. 1, 60 days.
>
> * * * * *

Nearly a year later, on October 21, 1935, the contractor requested a reopening of its claims, and then for the first time requested an additional extension of 52 days on account of delays in connection with the redesign of the building provided for in Change Order No. 1. The head of the department on October 8, 1936 disallowed the claim. A rehearing was requested and granted, and this claim was again denied, but upon a further rehearing it was granted. The contracting officer held:

> From the record it appears that when the negotiations resulting in Change Order No. 1 were being conducted it was expected that the contractor would be able to commence pouring concrete on October 1, 1932. (See contractor's letter of September 8, 1932.) Subsequent to the issuance of Change Order No. 1 there were delays occasioned by the failure of the Government to approve the redesign plans. The contractor was unable to start pouring concrete until November 22, 1932, and the final redesign plans were not approved by the Government until November 29, 1932. This delay of 52 days, October 1, 1932, to November 22, 1932, was not contemplated by Change Order No. 1 and, since it resulted from acts of the Government, is properly the basis for an extension of time.
>
> I find, therefore, that the contractor should be allowed an additional extension of time for completion of 52 days for delay caused by the Government in connection with the redesign of the structure.

Following the issuance of Change Order No. 1 on October 11, 1932, the engineers for the plaintiff and the defendant held frequent conferences on the new design, by means of which certain columns were to be eliminated. The work was intricate and complicated and was carried on expeditiously by both sides. The defendant did not unreasonably delay the plaintiff in finally approving the plans for the redesign.

20. On the day the plaintiff began to pour concrete defendant's representative ordered it not to pour footings located in a certain portion of the building. This was done on account of the unsatisfactory appearance of the soil, after the plaintiff had excavated for the footings, necessitating the making of load tests. These tests were made within the

next 8 days, after which the plaintiff was permitted to pour the footings in question. During the time the contractor continued to pour other footings and to do other work. The contracting officer, however, held that the plaintiff was entitled to an extension of time of 8 days on account of this stoppage of work. He made no finding on whether or not the defendant acted promptly in making the necessary tests.

A load test consists of placing a certain amount of weight on one or two square feet of ground and watching the settlement over a period of time. It is not shown that eight days was an unreasonable time within which to make these tests.

21. On August 24, 1933, the contractor notified the contracting officer that the sloped roof interfered with the penthouse louver and window openings which had been placed in accordance with contract drawings. Instructions were requested. These were issued the next day.

On August 26, 1933, the contractor notified the contracting officer his instructions would be carried out, which they were, and asked for a change order incorporating the changes, with extra compensation of $72.24 and 3 days' extension of the contract time. Negotiations were carried on relative to the question of an extension of time. Finally, Change Order No. 25 was issued on June 20, 1934, providing for $72.24 extra compensation, as the contractor had requested, and a one-day extension of the contract time. The change order was approved by the contractor. On January 9, 1935, defendant paid to the contractor the $72.24 in question.

22. In item (g) set out in finding 14 the plaintiff claims damages for 57 days' delay for defendant's failure to approve promptly and within a reasonable time the linoleum which it proposed to install.

The specifications on page 45 provided that:

> All linoleum shall comply with the requirements of the Federal Specification Board Secification No. 209 (LLL-L-351) for medium battleship $\frac{3}{16}$-inch linoleum, except as otherwise specifically mentioned * * *.

Specification 209 specifed that the color and finish of linoleum to be installed on Government jobs should be as follows:

> The surface shall be smooth and free from streaks, spots, indentations, cracks, and protruding particles of cork. The color and finish shall match a sample mutually agreed upon by buyer and seller.

In pursuance of this requirement the plaintiff on August 4, 1933, submitted to the contracting officer a sample of linoleum which it proposed to install. This sample was approved by the contracting officer on August 14, 1933.

The specifications for the job in question further provided with respect to linoleum:

> * * * The linoleum shall be specially treated by the manufacturer with a thin, clear lacquer preparation or other approved durable finish processed into the goods or applied during manufacture of the linoleum which shall protect the linoleum and seal dirt-absorbing pores of the material to prevent the penetration of greases, liquids, etc., and which shall furnish a surface from which ink, ammonia, weak acids, etc., may be easily removed without leaving spots or stains and which will give a satin gloss to the linoleum, without the application to the surface of wax or other polishing or coating material, but merely by use of a friction-polishing block or machine. The color of the linoleum shall be of an approved dark-brown shade.

On December 11, 1933, the contractor started to lay linoleum. Defendant took samples of it, and after examination the contracting officer rejected it because, he said, it "fails to comply with specification requirements and differs from the sample submitted by you for approval." The contracting officer was of opinion that it was not up to specifications because it was not treated with lacquer or other approved finish designed to protect and seal the surface from penetration of greases, liquids, etc., and which furnished a surface from which ink, ammonia, weak acids, etc., might be removed without spotting. The plaintiff made numerous efforts to secure approval thereof, but it was again rejected by the contracting officer on January 19 because it "is not in accordance with the approved sample with respect to finish or color," and because it failed "to comply with specification requirements."

Further efforts were made by the plaintiff to secure approval of the linoleum which it proposed to use and which had been delivered to the job. The contracting officer on February 2, 1934 wrote the plaintiff in part as follows:

> Careful consideration indicates that the samples of linoleum taken from the material furnished differed from the sample originally submitted and approved in the following respects:
>
> A. Resisting to spotting by ink, ammonia and weak acids.
> B. Color is of a different shade.
> C. The key pull is lower.
> D. The weight per square yard is lower.
> E. The water absorption is higher.
>
> While C, K and E noted above showed appreciable variation from the accepted sample, in all cases they fall within the limits of F. S. B. LLL-L-351 for 5/16 inch battleship linoleum. It was also demonstrated by your representative that resistance to spotting is made equal to the approved sample by buffing before testing; and spots may be removed by buffing.
>
> From the above it would seem clear that the sample submitted and approved is a higher grade product in all respects than the material furnished; the material furnished does, however, meet the minimum requirements of the applicable Federal Specifications. The resistance to spotting is not met in accordance with the requirements of the specifications, but this condition can be remedied by buffing the material and bringing the same to a high polish after it is laid. Under ordinary conditions the Hospital would insist on delivery of material in accordance with the requirements set up by the approved sample, making reasonable tolerance in the factors that create this standard; however, in view of the fact that the material does in most instances meet the minimum requirements set up by the applicable Federal Specifications, and the further fact that the operation is so far behind its scheduled time for completion, and that the necessity for the building is so urgent, you are advised that the material will be accepted on the following conditions:
>
> 1. That the material be buffed and brought to a high degree of polish to meet the spotting requirements.
> 2. That the color range must meet with the approval of the Superintendent of Construction.

3. That the base on which this material is to be laid and the surrounding border of same shall be placed in the condition required by the specifications.
4. That the material be unqualifiedly guaranteed for a period of five (5) years from the date of authorization for final payment; that all unsatisfactory portions shall be replaced and made good during this period of time, all in accordance with the article GUARANTY under "General Conditions" of the Specifications; and, also, that this guaranty be inclusive of the cement topping on which this linoleum is laid.

On receipt of advice from your organization that these conditions are acceptable, permission will be granted to proceed with the laying of this linoleum.

The contractor accepted conditions 1 and 2, but from this date until February 15 the parties continued negotiations with reference to conditions 3 and 4. On February 15 the contracting officer agreed to all the conditions set out in this letter and proceeded with the laying of linoleum on February 21, 1934. The head of the department in acting upon plaintiff's claim that it had been delayed 57 days due to rejection of this linoleum held:

> The United States was entitled to a reasonable time to determine whether the linoleum being laid was in accordance with the specifications. The correspondence indicates that the contracting officer attached to the specifications a further condition that the linoleum must be equal to the sample submitted at the time the bid was accepted. A careful analysis by the Bureau of Standards of the linoleum being laid by the contractor showed that all samples taken from the linoleum being laid were equal to the requirements of the specifications but were not equal to the sample originally submitted. It is evident that the contractor would be required to supply linoleum equivalent only to that required by the specifications and that the contracting officer was in error when he determined that the material must meet the qualifications of the samples submitted by the contractor at the time its bid was made. It is my opinion and I find as a fact that the contractor was delayed 57 days in completion of the work under its contract.

23. On August 16, 1933, when the construction of the ceiling commenced, a dispute arose as to whether or not ¾″

channel irons were to be used in connection with the lathing. The contracting officer insisted on their use; but the contractor insisted they had been eliminated by Change Order No. 1. Lathing of the ceiling was postponed until the dispute could be settled. The contracting officer finally ruled on August 29, 1933 that they were required and should be used. Whereupon lathing was resumed, the plaintiff using the channel irons as required.

This ruling of the contracting officer was erroneous, and the head of the department allowed the contractor the sum of $3,340.09 as additional compensation for the installation of these channel irons. This was duly paid by the defendant.

On October 30, 1933, the contractor requested the Assistant Secretary of the Interior to grant an extension of 13 days within which to complete the building because of the time required to determine whether or not these channel irons were to be used. On August 19, 1937, the Assistant Secretary allowed an extension of 5 days on the ground that "a reasonable time for approval of such material would appear to be eight days at the maximum."

The defendant unreasonably delayed the plaintiff five days in finally settling this question, for which it has not been compensated.

24. Plaintiff's overhead on this job was $69.25 per day.

The proof does not show the extent to which plaintiff lost the use of its equipment during the delays.

25. In making final settlement with plaintiff the Comptroller General deducted from the total of the extensions of time allowed by the head of the department, 299 days, two extensions aggregating 32 days, reducing the extensions allowed to 267 days. The contract was completed 274 days late. For the difference between the 274 days and the 267 days he assessed liquidated damages at the rate of $175.00 a day, a total of $1,225.00. This amount has not been paid plaintiff.

The proof does not show that the plaintiff was not delayed the number of days allowed by the head of the department, nor that it was not entitled equitably to the extensions of time granted.

The court decided that the plaintiff was entitled to recover.

WHITAKER, Judge, delivered the opinion of the court:

On September 7, 1932, plaintiff entered into a contract with the defendant for the erection of what was denominated the Male Receiving Building at St. Elizabeths Hospital, Washington, D. C.

In this suit plaintiff seeks to recover: (1) the sum of $21,482.00, the cost of structural concrete and reinforcing steel which it alleges it was required to use in addition to that required by the contract, as amended by change order No. 1; (2) the sum of $11,227.69 which it alleges was the amount of damages suffered by it on account of delays caused by the defendant; and (3) for the sum of $1,225.00, liquidated damages deducted at the time of final settlement.

Cost of additional structural concrete and reinforcing steel

On the day following the signing of the contract plaintiff suggested a change in the plans for the building which would eliminate many of the columns in the corridors and in the dining room of the building. This was to be done by the use of a two-way joist system, instead of the one-way system prescribed by the contract.

The defendant was unfamiliar with the two-way joist system but was interested in eliminating the columns and agreed to discuss the proposed change with plaintiff. These discussions resulted in the issuance of a change order on October 11, 1932, which was accepted by plaintiff, providing for the elimination of "certain columns to be designated when and if the contractor submits acceptable plans and methods to accomplish the desired result." It was stipulated in this change order that "the additional cost, if any, [was] not to exceed $8,600.00."

Plaintiff proceeded to prepare proposed plans. A number of conferences were had between the parties which finally resulted in the approval on November 29, 1932 of the plans submitted by the plaintiff. In plaintiff's letter transmitting these plans it said:

> We will greatly appreciate anything you can do to expedite formal approval of these drawings in accordance with the provisions of Change Order No. 1.

It was a provision of Change Order No. 1 that the additional cost was not to exceed $8,600.00. This amount has been paid the plaintiff.

That plaintiff well understood that the amount to be paid it for this work was not to exceed $8,600 is shown by its letter of December 15, 1932, in which it requested, "that the cost incident to Change No. 1 be fixed at Eighty-six Hundred Dollars ($8,600.00)."

Again on January 3, 1933 it wrote the contracting officer itemizing the cost going to make up the $8,600; and finally on January 11, 1933, the contracting officer wrote plaintiff, "you are advised the additional cost that you estimate of $8,600.00 for this additional work and materials to be placed is approved."

It is true that the plaintiff estimated that 5,692 cubic yards of reinforced concrete and 499.3 tons of reinforcing steel would be necessary to do the work, and that actually 5,752 cubic yards of reinforced concrete were actually used, but there is no showing that anything more was required of the plaintiff than was called for by Change Order No. 1, as supplemented by the plans drawn by the plaintiff and approved by the defendant.

Evidently plaintiff did not think that anything more was being required of it, because while the work was going on it made no such claim, it made no request for additional compensation, nor for any order in writing to do the additional work, which it was required by the contract to make if it was to claim additional compensation for doing any extra work. *Plumley* v. *United States*, 226 U. S. 545; *Griffiths* v. *United States*, 74 C. Cls. 245. It made no claim for extra compensation on this account until July 10, 1934, about two weeks before the entire building was completed.

We are clearly of the opinion that the plaintiff is not entitled to recover on this item.

Damages due to delays alleged to have been caused by the defendant

The contracting officer allowed plaintiff an extension of time of 123 days on account of delays which he held were

caused by the defendant. Plaintiff claims damages for these delays.

The first item is a delay of 52 days alleged to have been caused by the defendant in failing to approve promptly the plans for a redesign of the building to eliminate certain columns, discussed above.

As stated, plaintiff had suggested this change in the plans. This suggestion was approved by the defendant, subject to working out satisfactory plans. These plans were to be prepared by the plaintiff. It originally prepared the plans in its Chicago office and mailed them to Saint Elizabeths Hospital. Saint Elizabeths Hospital had secured the services of the Veterans' Administration to prepare the plans and otherwise assist it in the construction of this building. It referred plaintiff's plans to them for checking and approval. Correspondence back and forth ensued; but plaintiff and defendant soon found that the matter could not be handled at long distance, and plaintiff's representatives came from Chicago to Washington to go over the plans in person with defendant's engineers. A room in the Veterans' Administration building was put at their disposal and lengthy conferences between plaintiff and defendant were held daily. The proof shows that the matter was handled expeditiously by both parties. The commissioner has so found, and plaintiff has taken no exception to this finding. The testimony leaves no room for doubt that this is so.

Defendant's representative who was immediately in charge of checking these plans was a man by the name of Rafter, who had been borrowed by the Veterans' Administration from the Bureau of Yards and Docks for this purpose. He testified time and again that he and his associates did everything they could to expedite the work. He says they worked overtime practically every day, that they worked nights, that they worked on Thanksgiving day, Sundays, and Saturday afternoons.

Sholtes, who was the architectural engineer for Saint Elizabeths Hospital in charge of the architectural work, says there was no delay whatever, but that everyone did all they could to expedite getting out the plans.

Kelly, who was the superintendent of construction at Saint Elizabeths Hospital, testified:

> The matter was handled with unusual expediency [sic] because the Hospital was just as anxious to go ahead with the revision on a full-speed basis as the contractor could have been.

Sanger, the contracting officer, says that he gave the matter his personal attention so that it could be expedited. He said that it was he who suggested to plaintiff's representatives that they would make available to them a room at the Veterans' Administration where their representatives could work in close conjunction with representatives of the Government, in order that the matter might be expedited.

The plaintiff offers no testimony to refute this but relies alone upon the finding of the head of the department that the delay of 52 days "resulted from acts of the Government." Its position is that this finding of the head of the department is final and conclusive, and entitles it to damages. A reading of the testimony leaves no doubt in our minds that this finding is grossly erroneous, if it be construed to mean unwarranted acts of the Government. There is nothing in the testimony that supports it. When the claim was first made, the head of the department denied it; a rehearing was requested, and he again denied it; but for some reason—what, we do not know—he finally granted it after a further rehearing. In his original finding he did not hold that the delay was caused by the Government.

In a sense, of course, the delay was caused by the Government, in that it was occasioned by the checking of the plans by the Government before final approval, but the evidence does not justify a finding that the delay due to checking and final approval of the plans was due to defendant's failure to proceed with reasonable diligence. The testimony shows, on the other hand, that the defendant's representatives exercised great diligence in assisting plaintiff to work out plans that could be approved. If the finding of the contracting officer is to be construed as holding that there was unreasonable delay on the part of the Government in finally approving these plans, it must be set aside as being grossly erroneous. There is no evidence to support it.

The contract gave the defendant the right to make changes; this change, indeed, was suggested by the plaintiff; the additional amount to be paid on account of it was agreed upon. Unless, therefore, the defendant unreasonably delayed approving these plans, there can be no recovery of damages on account of the change. *Griffiths* v. *United States*, 74 C. Cls. 245, 254. The plaintiff is not entitled to recover damages on account of this 52 days' delay.

The second item of delay alleged to have been caused by the defendant is one of eight days, during which time the plaintiff alleges it was prevented from pouring footings.

Plaintiff was required to excavate for the footings. When it started to pour the concrete for them the inspector on the job stopped the pouring of nine of them because he was uncertain from the appearance of the ground whether or not it would bear the load to be placed upon it. He proceeded at once to make the necessary load tests. These tests are made by placing an appropriate amount of weight on one or two square feet of ground and watching the amount of settlement over an appropriate period of time.

Eight days was required by the defendant to make these tests. There is no proof in the record that this was an unreasonable length of time. What proof there is shows that this was not an unreasonable time.

The defendant, of course, had the right to test the load-bearing capacity of the ground after the plaintiff had excavated, and it had the right to stop the pouring of the concrete until these tests could be made. It was its duty, of course, to make the tests as promptly as practicable, but if it did this, no right of plaintiff's has been violated. Certainly it was not the duty of the defendant to permit the plaintiff to pour the concrete if it had reason to believe that the ground would not support the weight to be placed upon it.

It is true that the contracting officer allowed an extension of time for the performance of the contract of eight days on account of the stoppage in the pouring of the footings; but he has not found that this stoppage was unjustified or that the plaintiff was delayed more than a reasonable time within which to make the necessary tests. The mere fact

that an extension of time was granted on account of some act of the defendant is not sufficient to entitle plaintiff to recover damages for the delay caused thereby. It can only recover for an unjustifiable delay caused by the defendant. If the defendant was justified in stopping the work, then of course the plaintiff is not entitled to recover. The proof does not show that the defendant was not justified in stopping the pouring of the concrete on these footings.

The third item of delay for which damages are claimed is said to have been caused by defendant's failure promptly to change the specifications for a relocation of the louver and window openings in the penthouse.

During the construction of the building it was discovered that if built in accordance with the contract drawings the sloped roof would interfere with the penthouse louver and window openings. The contractor notified the contracting officer thereof, and an amendment of the drawings was requested. These were issued the next day. A change order was issued and accepted by the plaintiff providing for extra compensation on account of the change of $72.24, and for an extension of time of one day. This change order constituted a modification of the contract. Under the original contract, as modified by this change order, the plaintiff agreed to do the work for the original contract price, plus the $72.24 specified in the change order. This amount has been paid and, therefore, plaintiff is clearly not entitled to any further sum. *Griffiths* v. *United States*, *supra; Seeds & Derham* v. *United States*, 92 C. Cls. 97, certiorari denied, 312 U. S. 697.

The fact that the head of the department later ruled that plaintiff was entitled to an additional day's extension of time on account of this change does not alter the case. Plaintiff had originally asked for an extension of time of three days on account of this change, but under the change order only one day was allowed. Later, the head of the department ruled that plaintiff was entitled to an additional day. He might very well have held the plaintiff to its contract as set out in the change order, but he generously allowed an additional day; but he has not found any fact to show that the Government did not act promptly in mak-

ing the change, or otherwise unreasonably delayed plaintiff. The amount specified in the change order was in full of all compensation to which plaintiff is entitled on account of this change. It is the amount the parties agreed upon and plaintiff is not entitled to recover more.

The next item is for a delay of 57 days in finally approving the linoleum to be laid. The specifications with respect thereto provided in part that it should comply with the requirements of the standard Government specifications. These provided, "the color and finish shall match a sample mutually agreed upon by the buyer and seller." The plaintiff submitted to the contracting officer a sample on August 4, which the contracting officer approved on August 14. When the plaintiff began laying the linoleum the defendant, upon examination, ruled that it was not up to the sample approved and that it did not comply with the specifications, for the principal reason that it had not been treated so as to protect and seal the surface from penetration of greases, liquids, etc., and because ink, ammonia, and weak acids could not be removed therefrom without spotting.

The plaintiff exerted every effort to secure a reversal of this ruling, but the contracting officer refused to do so until February 2, 1934. He then permitted it to be laid, but only on the condition that it would be treated so that spots would not be left on it by the removal of ink and other substances which might fall on it. In his letter to the plaintiff of that date he reiterated his original position that the linoleum which plaintiff planned to lay differed from the sample originally submitted and approved because, among other things, ink, ammonia, and weak acids could not be removed therefrom without spotting it; but, he said, that inasmuch as that condition could be remedied by buffing the material and bringing it to a high polish after it had been laid, he would approve it, upon condition that it be buffed, and upon certain other conditions not here material. He also said in his letter that he was willing to approve it because, first, it complied with the general specifications for linoleum, as distinguished from the specifications for this particular job, and, second, because the building was so far behind in its scheduled time for completion and because the need for the building was so great.

The conditions laid down by the contracting officer were finally met by the plaintiff and the linoleum was laid.

We think the contracting officer was well within his rights in rejecting the linoleum plaintiff proposed to install. It failed to comply with the specifications for this particular job. Those specifications provided that the linoleum to be laid should not only conform to the general Government specifications for linoleum applicable to all jobs (Federal Specification Board Specification No. 209), but it went further than these general specifications and required, in addition, that it should "be specially treated by the manufacturer with a thin, clear lacquer preparation or other approved durable finish processed into the goods or applied during manufacture of the linoleum which shall protect the linoleum and seal dirt-absorbing pores of the material to prevent the penetration of greases, liquids, etc., and which shall furnish a surface from which ink, ammonia, weak acids, etc., may be easily removed without leaving spots or stains * * *." The proof shows that the linoleum which the plaintiff proposed to install had not been treated so as to permit the removal therefrom of ink, etc., without leaving spots. This was an adequate reason for its rejection. There is no proof in the record that this finding of fact by the contracting officer was not correct.

It is true the head of the department later held:

> * * * A careful analysis by the Bureau of Standards of the linoleum being laid by the contractor showed that all samples taken from the linoleum being laid were equal to the requirements of the specification but were not equal to the sample originally submitted.

The head of the department then proceeded to hold that the contractor's duty was fulfilled when it furnished linoleum equivalent to the specifications and that it could not be required to go further and furnish material which was equal to the samples submitted. For this reason he held that the contractor was delayed by the defendant 57 days in the completion of its contract.

It will be noted that the head of the department makes no finding as to whether or not the finish of the linoleum to be furnished would permit the removal of ink, etc., without spotting. The finding of the contracting officer that it would

not permit the removal of ink without spotting has not been overruled, and so far as we have been able to ascertain has not been contradicted by the proof. If this be a fact, then the linoleum which the contractor proposed to lay did not comply with the specifications applicable to this particular job, although it may have complied with Standard Specification No. 209, because these specifications have nothing to say about a surface from which ink, etc., could be removed without spotting. When the head of the department found that the linoleum to be installed was equal to the requirements of the specifications he undoubtedly had in mind the general specifications applicable to all jobs and did not have in mind the fuller specifications applicable to this particular job.

The ruling of the head of the department on whether or not the contracting officer was within his rights in rejecting the linoleum is a mixed question of law and fact. Under article 15 of the contract his decisions are conclusive in certain cases only on questions of fact, and not upon all questions. The contract does not make his decision on questions of law final and conclusive. Whether or not the defendant, through its contracting officer, violated plaintiff's rights in rejecting this linoleum is a question of law.

The head of the department has held as a fact that the linoleum did comply with the specifications, but did not comply with the sample submitted. Then, having made these findings of fact, the head of the department concludes:

> * * * It is evident that the contractor would be required to supply linoleum equivalent only to that required by the specifications and that the contracting officer was in error when he determined that the material must meet the qualifications of the samples submitted by the contractor at the time its bid was made.

Whether or not the contracting officer was in error is a question of law, and the ruling thereon of the head of the department is not conclusive on us.

We do not think he was in error. The defendant's general specifications for linoleum, with which the linoleum for this job was required to comply, provided that "the color and finish shall match a sample mutually agreed upon

by the buyer and seller." The head of the department has held as a fact that the proposed linoleum "were [sic] not equal to the sample orginally submitted." This being the fact—and no one disputes it—the contracting officer was not in error in rejecting it. He had a right to insist that it "match a sample mutually agreed upon." It was not equal to the sample agreed upon in that, among other things, ink and other stains could not be removed therefrom without spotting. Nor, for this same reason, did it comply with the specifications applicable to this particular job.

The fact that nearly a year later the head of the department in considering plaintiff's claim for an extension of time ruled that the linoleum complied with the specifications, however construed, cannot be treated as a reversal of the finding of fact of the contracting officer with respect to the removal of ink spots, because it was not made on appeal from this finding of fact; nor does the head of the department mention this particular finding, but merely holds generally that the material did comply with the specifications. This general finding is inconsistent with his finding that it was not equivalent to the sample. The specifications required that it should be. They required, too, that it should be treated so that ink spots could be removed without spotting. The proposed linoleum differed from the sample, among other things, in that ink spots could be removed from the sample without spotting, but could not be from the linoleum the plaintiff proposed to use.

We think the contracting officer was within his rights in rejecting this linoleum, and, therefore, the defendant is not liable for damages for the resulting delay.

The plaintiff's next claim for damages is for defendant's alleged delay in approving the lathing material.

The original design of the building called for the use of ¾-inch channel irons in connection with the lathing. When the two-way joist system was substituted for the one-way system, these channel irons were eliminated, but nevertheless the contracting officer insisted that the contractor use these channel irons, and upon the contractor's insistence that they were not called for by the contract, the contracting officer stopped the lathing until the dispute could be settled.

Lathing was stopped on August 16, 1933, but not until August 29, 1933 did the contracting officer finally settle the question. He settled it by requiring the contractor to use the channel irons. This ruling was admittedly erroneous, and the contractor has been paid $3,340.09 as additional compensation on account of this requirement. The contracting officer should have ruled more promptly on the dispute. The head of the department has ruled that by his delay in finally deciding the question he delayed the contractor five days in the completion of the work, and the contractor now sues for damages incident to this delay. We think it is entitled to recover therefor. The question should have been decided one way or the other within a few days. Instead, the contracting officer took 13 days to finally decide it.

The proof shows that the plaintiff's overhead was $69.25 per day. The contractor asks, in addition, the rental value of its equipment, but the proof fails to show to what extent, if any, its equipment was idle while this dispute was being settled.

On the proof it is entitled to recover only its overhead for these five days of delay. On this item the plaintiff is entitled to recover the sum of $346.25.

In addition to the 123 days of delay which the contracting officer held was caused by the defendant, the plaintiff asks damages for nine days in addition. Eight days' delay it claims was caused by defendant's delay in deciding whether or not to change the plastering material.

The plaintiff is clearly not entitled to recover damages on this account. Plaintiff itself proposed that the plastering material should be changed. The defendant did nothing more than give consideration to plaintiff's proposal. It did not order plaintiff not to do any plastering until it had decided this question. It was perfectly willing to go ahead with the plaster originally specified, and finally ordered the plaintiff to do so. Any delay in the matter was a delay caused by the plaintiff, for which, of course, it is not entitled to recover.

Plaintiff also asks damages for one day's delay alleged to have been caused by the defendant in stopping the laying of terrazzo. The defendant stopped it because it was not

satisfied with the grouting upon which the terrazzo was to be laid. The contractor insisted that the grouting was as it should be, and convinced defendant that it was. The laying of terrazzo was resumed the next day. The contract gave the defendant the right to make inspection and to stop the work if the material was not satisfactory. There was no showing that the inspector acted capriciously or without reasonable cause to believe that the grouting was not satisfactory. It was the inspector's duty to prevent the laying of terrazzo unless the grouting was up to specifications. As soon as he was convinced that it was, he permitted it to proceed. Plaintiff is not entitled to recover on this item.

In addition to the foregoing matters, the plaintiff claims it was delayed four days due to the failure of the defendant to furnish adequate temporary heat. This delay it says ran concurrently with the nine days' delay discussed above, but, inasmuch as we have held that plaintiff was not entitled to recover for these nine days, it is necessary to consider whether or not it is entitled to recover damages for the four days' delay caused by the inadequacy of the heat supplied.

Paragraph G-33 of the specifications reads:

> The temporary heat may be obtained by connecting the radiators for the buildings to the present lines of the heating system at the hospital at such points as designated by the superintendent. All connections shall be made by the contractor at his own expense, but the necessary steam for heat will be furnished by the Government after the building is fully inclosed, at no expense to the contractor.

It is clear from this provision of the specifications that the extent of the duty of defendant was to furnish the steam. Getting the steam from the boiler into the radiators was the job of the plaintiff. The specifications expressly provide that "all connections shall be made by the contractor at his own expense."

Although the defendant was not obligated to do so, it nevertheless ran a line from the heating plant to the new building, with which line the contractor connected. This

was a two-inch main; it proved inadequate to supply the necessary heat. When the defendant stopped the work because of the inadequacy of the heat, the contractor finally asked permission to be allowed to install a six-inch main. Instead of allowing the contractor to do this, the defendant did it itself, and thereafter no further trouble was experienced.

It is no doubt true that the two-inch main was responsible for the inadequacy of the heat, but the furnishing of this main was a gratuitous act on the part of the defendant. It was not obliged to furnish any main, nor was the contractor obligated to connect with the main furnished if it did not think it was adequate. When it did connect with it, it took the risk of its being adequate. Certainly it cannot hold the defendant responsible for having done an act for its benefit not required under the contract, and of which the contractor took advantage.

The plaintiff is not entitled to recover on this item.

Liquidated damages deducted

Finally the contractor sues to recover $1,225.00 liquidated damages deducted by the Comptroller General.

The contracting officer allowed total extensions of time of 299 days. The contract was completed 274 days after the original completion date, leaving 25 days' additional time within which plaintiff could have completed the contract without penalty. The Comptroller General, however, deducted from the extensions of time granted by the contracting officer a total of 32 days, reducing the extensions to 267 days, and assessed against the contractor liquidated damages for the difference between 267 days and 274 days.

The contract provides that the contracting officer, and not the Comptroller General, "shall ascertain the facts and the extent of the delay," and it makes his findings of fact thereon "final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto."

It is, therefore, the action of the head of the department that is before us for review. On the question now before us that action is binding on us unless we find that it was arbitrary or grossly erroneous. In no event are we bound under this contract by the action of the Comptroller General.

It appears that the head of the department was quite generous in his allowance of extensions of time, especially in his allowance of an additional 52 days for delay incident to the change of the design of the building, and of 57 days' delay in connection with the linoleum dispute. He might very well have disallowed both requests for extension, but we are unwilling to say that his action in granting them was arbitrary or grossly erroneous.

It is true that we have held that his decision that the defendant had caused the 52 days' delay incident to the redesign of the building was erroneous; but we cannot say that there was not in fact such a delay, irrespective of who caused it.

It is true that an extension of time of 60 days was originally granted in connection with change order No. 1, and that the 52 days is in addition thereto, and that final plans for the change in design were approved earlier even than the 60 days; but there is no finding on whether this original 60 days was granted on account of the delay in working out the plans for the change, or whether it was granted because it would take 60 days longer to construct a building under the new design than under the old. For what reason the original 60 days' extension was granted on account of this change is not shown.

The findings of the contracting officer are entitled to every reasonable presumption. It is not unreasonable to suppose that this 60 days' extension was granted because it would take that much longer to construct the building under the new design than under the old, and that the additional 52 days' delay was granted because of the delay in the final approval of the new design.

There was a delay in connection with final approval of the linoleum. We have held the plaintiff is not entitled to damages on account of this delay; but we have not held and

do not now hold that there was not such a delay, nor that equitably the plaintiff was not entitled to an extension of time on account thereof.

The evidence is not sufficient to justify us in setting aside the findings of the contracting officer on the extent of the delays. The action of the Comptroller General in deducting 32 days from the total extension granted by the head of the department must be set aside. *Karno-Smith Co. v. United States*, 84 C. Cls. 110, 124; *S. M. Siesel Co. v. United States*, 90 C. Cls. 582, 599.

The plaintiff is entitled to recover on this item $1,225.00.

On the whole case the plaintiff is entitled to recover $1,571.25, for which judgment will be entered. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE ATLANTIC REFINING COMPANY v. THE UNITED STATES

[No. 44001. Decided October 5, 1942]

On the Proofs

Capital stock tax; advances by wholly owned subsidiary; liquidation of parent company's liability by dividend.—Where plaintiff, a Pennsylvania corporation, in 1927 organized a wholly owned subsidiary under the laws of the State of Maines, to which subsidiary were transferred all of the stock of certain other subsidiaries in exchange for all of the stock of the Maine corporation; and where in 1932 and 1933 the Maine corporation made advances to the plaintiff in return for which the plaintiff gave its notes in like amount; and where said advances were not reported as income to plaintiff corporation in its income tax returns for 1932 and 1933, but were carried on plaintiff's books as liabilities; and where in 1934 the Maine corporation made two additional advances to the parent company, for one of which note of plaintiff was given; and where in 1934 the Maine corporation declared a dividend in an amount equal to the sum of said several advances; and where payment of said dividend to the sole stockholder, plaintiff corporation, was made by the cancellation of said notes and advances re-

Reporter's Statement of the Case

ceivable, and corresponding entries were made on the books of plaintiff; it is *held* the Commissioner of Internal Revenue properly increased plaintiff's adjusted declared value of its capital stock, as shown by its capital stock tax return for 1934, by the entire amount of the dividend declared in 1934 by plaintiff's wholly owned subsidiary, and plaintiff is accordingly not entitled to recover. (48 Stat. 680, 769.)

Same—Where the Maine subsidiary was formed by plaintiff for its own convenience in order to gain an advantage under the Pennsylvania capital stock tax law, after having enjoyed the benefits gained by the separate existence of said Maine corporation, plaintiff is not entitled to have that separateness disregarded now for its own advantage. *Higgins* v. *Smith*, 308 U. S. 473 cited; *Anketall Lumber & Coal Co.* v. *United States*, 76 C. Cls. 210, distinguished.

Same.—A taxpayer is free to adopt such organization for his affairs as he may choose, and having elected to do business by a certain method, must accept the tax disadvantages of such method.

The Reporter's statement of the case:

Mr. H. B. McCawley for the plaintiff. *Mr. Warren W. Grimes* was on the brief.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a Pennsylvania corporation, with its principal office in Philadelphia. It was engaged in refining and marketing petroleum products and prior to September 1927 had owned directly various subsidiary corporations engaged in the production and transportation of crude petroleum. September 26, 1927, plaintiff organized, under the laws of the State of Maine, The Atlantic Company (hereinafter sometimes referred to as the "Maine Company"), and caused to be transferred to it all the stock of various subsidiary corporations in exchange for all the stock of the Maine Company. This action was taken in order to have eliminated from its (plaintiff's) Pennsylvania capital stock tax return the value of capital stock

held by plaintiff in these subsidiary corporations whose assets were without the State of Pennsylvania.

2. After the formation of the Maine Company, it was the policy of plaintiff to make transfers of earnings received by that company from its subsidiaries to plaintiff from time to time as plaintiff required the use of those funds. When these transfers were made it was the practice of plaintiff to give the Maine Company a promissory note for the amount of each transfer. During the period from 1927 to 1931 various sums were transferred between the companies in that manner and at the end of 1931 whatever amounts had been transferred were adjusted between the two companies. While the policy of making transfers from time to time as desired was continued after 1931, in 1932 plaintiff adopted the practice of issuing notes every six months to the Maine Company on account of transfers made during a six months' period. As a result of this latter policy notes were given by plaintiff to the Maine Company during 1932, 1933, and 1934 on account of transfers of funds from the Maine Company to plaintiff, as follows:

June 30, 1932	$2,270,000
December 31, 1932	1,225,000
Total for 1932	3,495,000
June 30, 1933	3,290,000
December 31, 1933	2,915,000
Total for 1933	6,205,000
June 30, 1934	2,000,000

In addition, by December 24, 1934, further advances had been made by the Maine Company to plaintiff in the amount of $2,892,230 for which a note had not yet been issued.

The note of June 30, 1932, which differed from the other notes only in the amount involved, read as follows:

> On demand, we promise to pay to the order of Atlantic Company (Maine) the sum of Two Million, Two Hundred Seventy Thousand Dollars for value received.

No interest was ever paid by plaintiff to the Maine Company on any of these notes. The notes were carried as

notes receivable on the Maine Company's books and as notes payable on plaintiff's books.

3. December 24, 1934, the Maine Company adopted a resolution declaring a dividend of $14,592,230 which was made up of the amounts of $3,495,000, $6,205,000, and $2,000,000 for which the demand notes were given in 1932, 1933, and 1934, respectively, and an additional $2,892,230 withdrawn by plaintiff from the Maine Company during the latter half of 1934, but for which no note had been made. The resolution read as follows:

> RESOLVED, That a dividend of $415.00 a share be declared on the outstanding 35,162 shares of stock of this Company, totalling $14,592,230, payable on December 31, 1934, to stockholders of record at the close of business December 24th, 1934.

Upon the declaration of the dividend, the following journal entry was made on the books of the Maine Company:

Dividends Paid	$14, 592, 230. 00	
Notes Receivable—The Atlantic Refining Co		$11, 700, 000. 00
Advances—The Atlantic Refining Co		2, 892, 230. 00

Dividend #1 of $415.00 per share on 35,162 shares or $14,592,230.00 was declared on 12/24/34 payable 12/31/34 per attached copy of resolution by the Board of Directors. The Atlantic Refining Company holding the entire amount of outstanding stock of the Atlantic Company, received credit for this amount by our cancelling Advances Receivable from them of $2,892,230, and our cancelling the following Notes Receivable due by Atlantic Refining Co.

Dated	*Amount*
6/30/32	$2, 270, 000. 00
12/31/32	1, 225, 000. 00
6/30/33	3, 290, 000. 00
12/31/33	2, 915, 000. 00
6/30/34	2, 000, 000. 00
	11, 700, 000. 00

Consistent entries were likewise made on the books of the plaintiff. This was the first dividend ever declared by the Maine Company.

4. At all times when funds were transferred to plaintiff, as shown in the preceding findings, the Maine Company had an earned surplus in excess of the amounts transferred, such surplus being profits realized subsequent to February 28, 1913.

5. In filing its income tax returns for the years 1932 and 1933, plaintiff did not include therein as dividends received in those years the amounts of $3,495,000 and $6,205,000 referred to above as having been transferred by the Maine Company to plaintiff in those respective years. In its income tax return for 1934 plaintiff showed the entire amount of $14,592,230 as dividends received by it in 1934 and plaintiff deducted these dividends in computing its taxable net income for that year.

6. September 28, 1935, pursuant to an extension of time allowed, plaintiff filed its capital stock tax return for the year ending June 30, 1935, showing an adjusted declared value of its entire capital stock for the income-tax taxable year ended December 31, 1934, of $79,904,486.02 and a capital stock tax due of $79,904 which it paid October 1, 1935. In fixing the adjusted declared value, plaintiff first set out the original declared value as established by the return for the taxable year ended June 30, 1934, of $80,-000,000, that is, the declared value of its capital stock as of December 31, 1933, the end of the preceding income-tax taxable year. It then made adjustments by way of additions and deductions on account of transactions during the income-tax taxable year 1934. Among the additions made to the original declared value was the amount of $4,892,230 referred to in finding 3 as having been transferred by the Maine Company to plaintiff during the calendar year 1934, but no adjustment was made on account of the two amounts of $3,495,000 and $6,205,000 which made up the remainder of the dividend declared by the Maine Company December 24, 1934, and referred to in finding 3.

7. Thereafter the Commissioner examined the plaintiff's capital stock tax return referred to in the preceding finding and increased the adjusted declared value by the amounts of $3,495,000 and $6,205,000 on the ground that those two amounts represented dividends received by plaintiff in 1934

which were deducted by plaintiff in computing its taxable net income for that year. As a result of that determination, the Commissioner assessed an additional capital stock tax for the fiscal year ended June 30, 1935, of $9,700, which, with interest of $1,061.55, plaintiff paid May 10, 1937.

8. September 21, 1937, plaintiff filed a claim for refund of the capital stock tax of $10,761.55 which was paid as shown in the preceding finding and assigned as grounds therefor that the Commissioner had improperly included in the adjusted declared value of its capital stock for the fiscal year ended June 30, 1935, $3,495,000 and $6,205,000 ($9,700,000) as dividends received by plaintiff from the Maine Company, whereas plaintiff received those dividends from its wholly owned subsidiary, the Maine Company, in the years 1932 and 1933, respectively.

9. January 4, 1938, the Commissioner notified plaintiff of the rejection of its claim for refund, his letter reading in part as follows:

> Since the evidence discloses the Atlantic Refining Company gave notes to the Atlantic Company (Maine) in exchange for the amounts advanced during the years 1932 and 1933, it would appear that the Atlantic Refining Company was indebted to the Atlantic Company until the declaration of the dividend in the amount of $14,592,230.00, which dividend was paid by the cancellation of the notes and accounts payable. In view of the foregoing, and as no dividends were declared during 1932 and 1933 by the Atlantic Company, it is held that the amount of $9,700,000.00 should be included in the addition under item (5), Schedule I, and that the additional assessment of tax and interest was properly made.

10. The parties have stipulated (Joint Exhibit A, made a part hereof by reference) that in the event judgment should be entered in favor of plaintiff on account of the additional assessment referred to above, the amount claimed in plaintiff's petition should be reduced by $807, plus interest thereon at 6 percent per annum from July 31, 1935, on account of the refund of that amount of 1935 capital stock tax to the Maine Company, of which plaintiff was the sole stockholder and the sole transferee in liquidation.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

This is a suit for the recovery of capital stock tax paid by plaintiff for the year ending June 30, 1935. The only issue involved is whether plaintiff's adjusted declared value of its capital stock shall be increased by the entire amount of a dividend declared by plaintiff's wholly owned subsidiary corporation on December 24, 1934.

Plaintiff is a Pennsylvania corporation which has been engaged in the refining and marketing of petroleum products for many years. In 1927 it owned the stock of various subsidiary corporations which were engaged in the production and transportation of crude petroleum. In that year, in order to facilitate the preparation of its Pennsylvania State capital stock tax return and bring about a situation more favorable to itself in the amount of tax which it would be required to pay under such return, it caused to be organized The Atlantic Company under the laws of Maine and transferred to the Maine Company all the stock of these subsidiary corporations in exchange for the stock of the Maine Company. During the period from 1927 to 1931 various sums were transferred between plaintiff and the Maine Company as the needs or desires of the two companies required, but by the end of 1931 whatever amounts had been transferred were adjusted between the two companies.

From the beginning of 1932, amounts continued to be transferred from the Maine Company to plaintiff and at the end of each six months plaintiff would give to the Maine Company its demand promissory note for whatever amounts had been transferred during the six months' period. Pursuant to that arrangement plaintiff gave to the Maine Company two promissory notes in 1932 (one on June 30, 1932, in the amount of $2,270,000, and another on December 31, 1932, for $1,225,000), and two similar notes in 1933 (one on June 30, 1933, in the amount of $3,290,000, and another on December 31, 1933, for $2,915,000). Further transfers were made by the Maine Company to plaintiff

during 1934 with the result that in December 1934 there was owing by the plaintiff to the Maine Company the sum of $14,592,230, and on December 24, 1934, the Maine Company adopted a resolution declaring a dividend in the total amount of the indebtedness. With the adoption of that resolution, the notes which had been given were canceled and marked paid as of December 31, 1934. In its income-tax return for 1934, plaintiff showed the entire amount of the dividend declaration ($14,592,230) as having been received in 1934 and deducted that amount in computing its taxable net income for that year.

Section 701 of the Revenue Act of 1934[1] provides among other things that in determining the adjusted declared value of a corporation's capital stock for the purpose of the capital stock tax for the year subsequent to the original declaration, the corporation shall take the original declared value and make various adjustments thereto, by way of additions and deductions, on account of transactions which occurred during the year subsequent to that for which the

[1] Section 701 of the Revenue Act of 1934 (48 Stat. 680,769) provides in part as follows:

(a) For each year ending June 30, beginning with the year ending June 30, 1934, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended) as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid in surplus and contributions to capital, (3) its net income, (4) the excess of its income wholly exempt from the taxes imposed by Title I over the amount disallowed as a deduction by section 24 (a) (5) of such title, and (5) the amount of the dividend deduction allowable for income tax purposes, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings or profits, and (C) the excess of the deductions allowable for income tax purposes over its gross income; adjustment being made for each income-tax taxable year included in the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. The amount of such adjustment for each such year shall be computed (on the basis of a separate return) according to the income tax law applicable to such year. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted (for the same income-tax taxable years as in the case of a domestic corporation), in acordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases in the capital employed in the transaction of its business in the United States.

original declaration was made. Among the additions provided in that section is the "amount of the dividend deduction allowable for income tax purposes." Section 23 of the same act provides that in computing net income for income tax purposes there shall be allowed as a deduction "the amount received as dividends from a domestic corporation."

When plaintiff came to prepare its capital stock tax return for the fiscal year ending June 30, 1935, it took the adjusted declared value which it had used for the previous fiscal year and made certain additions to and deductions from that amount as required by section 701, *supra*, except that when it came to adjust for dividends received during that year it made no addition to its adjusted declared value on account of $9,700,000 of the dividend of $14,592,230 which was declared by the Maine Company December 24, 1934, and payable December 31, 1934, and for which a deduction was taken in computing its taxable net income for 1934. On examination of the return, the Commissioner added that amount to plaintiff's adjusted declared value of its capital stock and on account thereof assessed and collected an additional tax of $9,700 plus interest.

Our only question is whether the Commissioner properly increased plaintiff's adjusted declared value of its capital stock on account of the entire dividend declaration of December 24, 1934.

Plaintiff's position is that these amounts which make up the $9,700,000 should be looked on as if they were dividends when they were transferred to the plaintiff in 1932 and 1933 and that the dividend declaration in 1934 was without significance. In effect it would have us say that when the amounts were transferred by the Maine Company to plaintiff and notes given by plaintiff, there was in fact no liability of plaintiff to the Maine Company but that these amounts were dividends by the Maine Company to plaintiff in 1932 and 1933. We disagree. The Maine Company was formed by plaintiff for its own convenience in order to gain an advantage under the Pennsylvania State capital stock tax law, and after having enjoyed the benefits which resulted from its separate existence it would now have that

separateness disregarded. As the Supreme Court said in *Higgins* v. *Smith*, 308 U. S. 473, 477-478:

> * * * the taxpayer, for reasons satisfactory to itself voluntarily had chosen to employ the corporation in its operations. A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages.
>
> On the other hand, the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and manner of taxation. It is command of income and its benefits which marks the real owner of property.

See also *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415.

The case of *Anketell Lumber & Coal Co.* v. *United States*, 76 C. Cls. 210, cited by plaintiff, is easily distinguishable from the case at bar. In that case it was a family owned corporation. No notes were given. The withdrawals were not for the benefit of the corporation, but for the personal advantage of the husband and wife who owned more than 95 percent of the capital stock of the company and who completely controlled its policies. The withdrawals which the Commissioner treated as dividends were not repaid to the corporation until after the tax controversy arose. After repayment the corporation again returned the money to the husband and wife who controlled the corporation, thus showing that the entire repayment was a simulated transaction. Besides, the issue involved income and excess profit taxes rather than a capital stock tax.

In the *Anketell* case and the case at bar the plaintiff sought by self-serving declarations to escape from the apparent face of the record with which such declarations did not tally. This is especially true in the instant case.

When the amounts in question were being received by plaintiff in 1932 and 1933, promissory notes were given to the Maine Company and the amounts were carried on the books of the Maine Company as notes receivable and on the books of the plaintiff as notes payable. To the outside world they appeared as assets in the hands of the Maine Company and as liabilities of the plaintiff. That condition continued until the dividend declaration of December 24, 1934. Plaintiff urges that these amounts were dividends in 1932 and 1933 because it had no intention of repaying them. Plaintiff's president, who was treasurer at the time the notes were issued and who signed them, testified that he considered the notes legal documents but "gave no thought or apprehension as to the necessity of ever having to repay them." But had circumstances developed in which it would have been to the advantage of the plaintiff to treat the notes as binding obligations, it is easy to see how such a contention could well have been advanced and what difficulties the Commissioner would have met had he sought to deal with them as if they were in no sense liabilities. To disregard a transaction carried out in such a manner, when to do so would be to the advantage of the parties who formally for their own other advantage created it, would put a premium on transactions of this kind.

What the Commissioner did was to treat the dividend declaration of December 24, 1934, by the Maine Company as a dividend and the liquidation of the demand notes by plaintiff as the receipt of a dividend by the latter company. Since that action conforms to what was done, we can see no reason for disregarding these formal acts of the parties.

It follows therefore that the petition should be dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

C. E. CARSON COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44040. Decided October 5, 1942]

On the Proofs

Government contract; lowest qualified bidder.—Where plaintiff was the lowest bidder in response to an invitation for bids issued by the defendant for rental of gasoline locomotives in accordance with certain definite specifications forming a part of the invitation for bids; and where the locomotives which plaintiff proposed to furnish did not, upon inspection, meet the requirements of the specification and were not accepted by defendant; it is *held* that the plaintiff was not the lowest qualified bidder, no contract was entered into between plaintiff and defendant, and plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. Frederic M. Towers for the plaintiff. *Mr. Norman B. Frost* and *Messrs. Dent, Weichelt & Hampton* were on the brief.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff sues to recover $7,092 as damages for the alleged retention by the defendant of three gasoline locomotives alleged to have been delivered to it, and for the failure of the defendant to call for the delivery of and to use three additional available locomotives, said amount being the monthly rental bid price of plaintiff at the rate of $197 a month for each locomotive, totaling $1,182 a month for six months, during which period it is alleged the locomotives were possessed by the defendant or held by plaintiff in readiness for use of the defendant under a bid submitted by plaintiff on May 12, 1936.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, an Illinois corporation, has been engaged in the contracting business since 1914. May 5, 1936, the Assistant Supervisor of Operations, District No. 3, Works Progress

Administration, at Chicago, sent a requisition to the State Procurement Officer of the Treasury Department at Chicago, who was the authorized contracting officer for the defendant to procure six gasoline locomotives for use of the Works Progress Administration on Project No. 1267, at Evanston, Illinois. Six gasoline locomotives which had theretofore been used on Project No. 1267 had been rented under contract from the Equipment Corporation of America, whose contract had expired or would soon expire. The contracting officer issued an invitation for bids for the locomotives which was accompanied by the detailed specifications. This invitation, the bid of the successful bidder, the acceptance thereof, and the written specifications were to become the contract between the parties. The written specifications which accompanied the invitation, on the basis of which bids were to be submitted and the contract awarded, called for six gasoline locomotives on a monthly unit rental basis, new or used, without operator, with maintenance and repairs. The locomotives were to be for the 24″ gauge track type, of 7- or 8-ton size and to be rated at not less than 3,500 pounds drawbar pull capacity, powered with gasoline engine unit of sufficient horsepower rating to operate the locomotive at maximum capacity, 4-speed transmission forward and reverse, closed or open type cab with top, and to be complete with all equipment, attachments and accessories including electric starter, front and rear headlights, warning signal, brakes, sanding and lubricating equipment, tool box with lock and key, and necessary tools for making ordinary adjustments, necessary for efficient operation, said equipment to be delivered to the Works Progress Administration, f. o. b. Project Site, Church Street and McCormick Road, Evanston, Illinois.

The invitation for bids also contained the following provisions:

> *Inspection.*—The equipment shall comply with all Federal, State, County, Municipal, and Works Progress Administration Regulations, where applicable; and shall be subject to inspection by the Works Progress Administration Project Supervisor and Works Progress Administration Safety Consultant.

Any piece of equipment, or appurtenance thereto rejected at any time, by the Works Progress Administration as unsatisfactory shall be replaced immediately by the bidder with an acceptable one.

Time of Delivery.—Upon receipt of purchase order, bidder shall consult the Works Progress Administration, Attention Mr. J. P. Noonan, Chicago, Illinois, telephone Harrison 5252, extension 203, regarding details as to when and where to make delivery. Delivery shall be made within three (3) days of receipt of purchase order, if required.

Purchase Orders.—The U. S. Treasury Department, State Procurement Office, may issue purchase orders not in excess of the estimated maximum rental time and period, as the needs of the project develop. In no case will the bidder receive payments under this contract for rental time not covered by purchase orders issued prior to the expiration of previous purchase orders. In no case will purchase orders be issued in excess of the estimated maximum rental time and period as hereinbefore indicated.

Payment.—Payment for rental of equipment shall be By the Month and payment shall be made for the time that the equipment is available for use On the Project starting at time of delivery acceptance and ending at the termination of the equipment rental period as herein specified. * * *

A true copy of the bid form and the specifications are in evidence as Exhibit 1 and are made a part hereof by reference.

2. May 12, 1936, plaintiff submitted a bid to furnish six Whitcomb gasoline locomotives, without operator, but with maintenance and repairs, at a monthly rental of $197 per locomotive. Two bids were received; the other bid was submitted by the Equipment Corporation of America to furnish four Plymouth and two Whitcomb gasoline locomotives as required by the specifications, without operator but with maintenance and repairs, at a monthly rental of $269 for each locomotive.

The bids were publicly opened by the contracting officer May 15, 1936. A representative of the plaintiff was present at the time the bids were opened and learned that plaintiff was the lowest bidder.

3. None of the locomotives which plaintiff proposed to furnish, or could furnish under its bid, met all the requirements of the specifications. Only two of plaintiff's locomotives had four speeds forward and reverse, as called for and required by the specifications, and the locomotives did not have electric starters or headlights as required. The locomotives covered by the bid of the Equipment Corporation of America and proposed by it to be furnished to the defendant met all the provisions and requirements of the specifications. The Equipment Corporation of America was the lowest qualified bidder. After a due and proper inspection by the chief engineer of the Works Progress Administration, whose authority and duty it was to make such inspection of the locomotives offered by plaintiff and of the locomotives of the Equipment Corporation of America, the contracting officer awarded the contract for the six locomotives called for to the Equipment Corporation of America and rejected plaintiff's bid.

Plaintiff objected to the awarding of the contract to the Equipment Corporation of America and endeavored to have its locomotives accepted and a purchase order for the rental thereof issued to it. A further inspection and test of three of plaintiff's locomotives by the Works Progress Administration was had and a report was made by the Works Progress Administration that these three locomotives "performed satisfactorily." The contracting officer refused to cancel the contract with the Equipment Corporation and award the same to plaintiff for locomotives which did not fulfill the requirements of the specifications.

4. No contract was ever awarded plaintiff for any of its locomotives. The Works Progress Administration has not had in its possession for use any of plaintiff's locomotives. The possession of three locomotives by the representatives of the Works Progress Administration for a short time on May 26, 1936, was solely for the purpose of inspection and test. After that inspection and test of the three locomotives they were left for plaintiff's disposition and were never thereafter in the possession of defendant. Plaintiff left the three locomotives on the ground where they were left

by the representative of the Works Progress Administration after they had been inspected and tested.

5. No person employed by the Works Progress Administration had any authority to make or enter into a contract, express or implied, with plaintiff on behalf of the defendant or to accept or use plaintiff's locomotives in the absence of a contract between plaintiff and the Procurement Officer of the Treasury Department. No contract, express or implied, existed at any time between plaintiff and the defendant.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts established by the record in this case show that while plaintiff was the lowest bidder in response to an invitation for bids issued by the defendant for rental of gasoline locomotives in accordance with certain definite specifications forming a part of the invitation for bids, all of which were to constitute the contract between the successful bidder and the defendant, plaintiff was not the lowest qualified bidder.

The locomotives which plaintiff proposed to furnish did not meet the requirements of the specifications, and the contracting officer so found. The defendant, through the contracting officer, rejected plaintiff's bid. None of the locomotives were ever received by the contracting officer, nor was any of them ever used by the defendant. The only possession which any employee of the United States ever had of any of plaintiff's locomotives was for a short time on May 26, 1936, solely for the purpose of inspection and test of three locomotives by representatives of the Works Progress Administration. After this inspection and test they were left at the place where they were tested for such disposition as plaintiff desired to make of them. The Works Progress Administration did not at any time use any of plaintiff's locomotives.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

J. R. WOOD & SONS, INC., A CORPORATION, v. THE UNITED STATES

[No. 44104. Decided October 5, 1942]

On the Proofs

Excise tax; organization of separate corporation; intent.—Where plaintiff, a corporation, successor to a partnership engaged since 1850 in the manufacture and sale of jewelry; in June 1932 formed a wholly owned subsidiary corporation to which plaintiff's watch business was transferred; and where the formation of such separate corporation had been advocated and considered for some time prior to June 1932 as a measure for conducting such watch business more satisfactorily and with more prospect of profit; it is *held* that the purpose and intent were to conduct the watch business by a separate corporation in order that merchandise problems and difficulties which had been experienced might be overcome, the new corporation was not a mere shell or scheme to avoid excise taxes under the Revenue Act of 1932, and plaintiff is entitled to recover. *Chisholm* v. *Helvering*, 79 Fed. (2d) 14 (certiorari denied, 296 U. S. 641) cited; *Gregory* v. *Helvering*, 293 U. S. 465; *Higgins* v. *Smith*, 308 U. S. 473; *Griffiths* v. *Helvering*, 308 U. S. 355; *Black, Starr & Frost-Gorham, Inc.*, v. *United States*, 94 C. Cls. 87, distinguished.

Same.—In the case at bar the transaction was in substance and fact what it appeared to be in form.

Same.—The fact that the organization of a new corporation had some effect on the amount of tax which the parent corporation would otherwise have to pay (*Chisholm* v. *Helvering*) does not justify the holding that such additional taxes should be paid.

Same.—The organization of a separate corporation can not be condemned as an evasion of taxes merely because there is no change in the location of headquarters, or because it does not have new and separate officers, if there is a good business reason upon which such action was based.

Same.—The fact that a new excise tax, about to go into effect, was involved in the instant case, instead of an existing income tax, can not destroy the propriety and legality of what was done where the legitimate business intention is established.

The Reporter's statement of the case:

Mr. Clarence F. Rothenburg for the plaintiff. *Messrs. Hamel, Park & Saunders* were on the brief.

Mr. S. E. Blackham, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff sues to recover $9,121.72 with interest, representing excise taxes, penalty, and interest on sales of imported watches by the John R. Wood Sales Corporation alleged to have been erroneously and illegally assessed against and collected from plaintiff, as the alleged importer and seller of watches under section 601 of the Revenue Act of 1932, for the period June 20, 1932, to March 31, 1935, inclusive.

The defendant contends that the incorporation and organization of John R. Wood Sales Corporation by plaintiff was simply a scheme or device to evade the payment by plaintiff of the excise tax on sales of watches imported by it and that the sales of the watches by the Sales Corporation after June 20, 1932, were, for tax purposes, sales by plaintiff as the importer thereof and that such sales were taxable to plaintiff as such importer and alleged seller of watches.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a New York corporation with its principal office and place of business in New York City.

2. The business in which plaintiff is engaged was started as a partnership in 1850 and consisted of manufacturing plain gold band wedding rings. In 1896, the partnership began manufacturing engraved wedding rings and ring mountings and also began diamond cutting; about 1900, it began manufacturing cuff links and solid gold jewelry of a commercial type; and later, it began the manufacture of lavallières, gold bracelets, and other fancy jewelry.

3. The business of the partnership was strictly that of a wholesale manufacturer, and at first it sold direct to retail stores by mail. About 1919, it began to employ salesmen and by 1928 it had a sales force of twenty men. The great majority of the retail jewelry stores to which it sold its merchandise were the average small stores throughout the United States and it did not cater to stores handling jewelry retailing at higher prices.

4. To increase its volume of business, the partnership in 1928 decided to secure a good watch movement on which it could place its name. It was believed that the salesmen could carry the watch into the retail stores at the same time they sold the rings and other jewelry. After investigation, on March 26, 1928, the partnership signed a contract with the Société Anonyme Louis Brandt & Frere (Omega Watch Company), hereinafter sometimes called the "Omega Company," of Switzerland, which manufactured the Omega watch, to act as exclusive agent for that watch and parts in the United States and Alaska.

5. In 1930, the partnership consisted of two members, Rawson L. Wood and St. John Wood, brothers, both of whom were elderly, and at that time it was felt that in the event of the death of one or both of the partners difficulty might be experienced in continuing the business. The partnership was accordingly incorporated on January 30, 1930, under the name of "J. R. Wood & Sons, Inc." Rawson L. Wood died in 1930 and St. John Wood in 1932.

6. The merchandising of the Omega watches began in January 1929 and their sponsorship by plaintiff was widely advertised. While the Omega watch was a high-grade article and had a splendid reputation in Europe and other places where it had been sold, it was unknown generally in the United States and plaintiff soon found that the job of merchandising the product was far greater than had been anticipated. The Omega Company was induced to help finance the advertising campaign in this country under an agreement whereby the amounts advanced were to be repaid when the sales of watches reached $100,000. Advances for that purpose were made by the Omega Company to plaintiff until June 20, 1932, and to the John R. Wood Sales Corporation for at least two or three years thereafter. The watch was a high-priced product, occupying a price range of $36 to $120, whereas the jewelry sold by the partnership and by plaintiff was low-priced though of a high quality. During the latter part of 1929 the partnership began to experience difficulty with the merchandising of the watches because a jeweler who was willing to stock them insisted that he have the exclusive agency therefor. This caused embar-

rassment as the partnership was selling its other products to more than one and, in some cases, to all the jewelers in a given town. The same difficulty continued after the partnership was succeeded by plaintiff. In some cases jewelers in a given town who previously had purchased rings from the partnership and plaintiff discontinued such purchases when they found that an exclusive agency for the watch had been given to another jeweler in the same town and they were unable to secure such a watch when it was desired by one of their customers. Another difficulty experienced by the partnership and plaintiff was that when an effort was made to interest one of the better stores in a given town or city in taking the agency for the Omega watch it was very difficult to convince such a store than an organization which sold its other products to various concerns in the lower-priced field would not also sell the Omega watch in a similar manner.

7. Because of the difficulties referred to in the preceding finding, early in 1930 certain officials and employees of plaintiff began to discuss the question of forming a separate corporation, with a different name, to handle the watch business. Another purpose in the formation of a separate corporation was to limit the liability of plaintiff to the Omega Company for the money advanced by the latter on advertising the Omega watch. The creation of a new corporation to handle the watch business was first advocated in 1930 by the manager of the watch department of plaintiff who was familiar with the difficulties that were being experienced in merchandising the Omega watch. One suggestion advanced was that the word "Omega" appear in the name of the proposed corporation which, it was urged, would give more publicity to the Omega watch, and would also serve to show a separation of the watch business from the other business being carried on by plaintiff. Another argument advanced by the manager of the watch department was that rings and watches were so different it was not feasible to have them sold by salesmen of the same corporation.

February 16, 1932, the manager of the watch department wrote a memorandum to plaintiff's treasurer reading in part as follows:

> I had a long talk with Jack Kohler today, and he reverted to the same old topic of selling Omega under the name Wood. He says it is a distinct disadvantage in the fine stores, where it is generally believed that Wood sells everybody, and so Omega cannot be kept exclusively a product for the fine stores.
>
> In view of the fact that Omega can only be sold on the basis of being an exclusive product for high-grade stores, I am sure that there is a lot in what Jack says.
>
> Why don't we form a new corporation and get away from criticism by Wood's customers and set aside to a great extent the hesitancy of fine stores?
>
> We run the Omega department entirely as a separate thing now, so why not go ahead and do the job right?
>
> Could we see W. W. S. [plaintiff's vice president] about this?

April 12, 1932, the same manager wrote a memorandum to plaintiff's vice president reading as follows:

> Have been trying to get in touch with you to advise receipt of cable from Omega telling us the timers for Olympic games will be here in time—so that's one worry out of the way.
>
> By the way, here is another instance where we could get publicity for Omega products if only we were a separate company, but I know that all the publicity will be addressed to J. R. Wood & Sons, and Omega will just be incidental.
>
> Have you given any more thought to the proposition of change?

At the same time, plaintiff's manager and treasurer discussed the matter of forming the new corporation with plaintiff's officers and it was suggested that a convenient time for the organization of the new corporation to take over and handle the watch business would be when inventories were taken at the end of the fiscal year ending July 31, 1932.

8. As hereinbefore shown, a separate corporation to take over and handle the watch business had been and was being urged by the officials and manager in charge of plaintiff's business, but plaintiff's directors, who were very conservative, were not at first convinced of the necessity of organizing a separate corporation to handle the watch business. However, as the merchandising difficulties and problems continued to exist without improvement they realized, some time prior

to June 20, 1932, and independently of any tax considerations, the importance of organizing and having a separate corporation to take over and handle the Omega watch business. When the matter was first proposed in 1930 the directors felt that the seriousness of the merchandising problems and difficulties were somewhat exaggerated, but as the discussions continued and the matter was considered the officers and directors became more and more convinced that the only real solution of the problems and difficulties was to create a separate corporation to take over and handle the watch business. Discussions of the problem between plaintiff's officers and directors thereafter continued during 1931 and the early part of 1932 but no formal action was taken by plaintiff's directors authorizing the formation of the separate corporation until June 20, 1932. Plaintiff's officers came to the conclusion in the early part of 1932, and sometime prior to June 20, that a separate corporation should be created. It had been suggested that a good time to take such action would be the end of the fiscal year. However, when, on the morning of June 20, 1932, it was brought to the attention of plaintiff's vice president who was the officer in active and immediate charge of plaintiff's business, that a tax on the sale by an importer of imported merchandise would become effective the following day, the vice president decided that the separate corporation should be immediately authorized and organized. Tax matters or the effect of organizing a separate corporation upon plaintiff's federal taxes had not at any time entered into the matter, discussions or considerations which had led plaintiff's officers and directors to come to the conclusion that the separate corporation should be organized. On the morning of June 20, plaintiff's vice president communicated with plaintiff's directors and its attorney advising them of his information concerning the excise tax, and requested that if the separate corporation was to be created and organized the necessary action be immediately taken. This was done. The separate corporation known as the "J. R. Wood Sales Corporation" was formally authorized and was organized on June 20, 1932. The "Sales Corporation" had a capital stock of $5,000 all of which was issued to plaintiff for cash.

9. The reasons for and the underlying purpose of the authorization and organization of the J. R. Wood Sales Corporation were legitimate business reasons and purpose. Except for these business reasons and purpose the separate corporation would not have been authorized and organized because of the imposition of the federal excise tax upon the sale by the importer of imported merchandise.

10. Upon the formation of the Sales Corporation and on the same day, plaintiff and the Sales Corporation entered into an agreement under which the latter purchased the entire watch business from plaintiff for $60,000, and gave in payment therefor its note dated June 20, 1932, for $60,000, payable on demand. The watch business consisted of the watch inventory comprising watch movements only, watch cases only, complete watches, repair parts, and certain assets and liabilities having to do with the watch business. The miscellaneous assets and liabilities transferred were set up on the separate books of the Sales Corporation in July 1932, as follows:

Deferred advertising	$875.00	
Duty deferred	623.25	
Furniture & Fixtures	3,232.30	
Omega, Special Advertising Ascount	947.01	
Omega, Tools & Dies	350.00	
Advance Acc't, John H. Kohler	$68.18	
J. R. Wood & Sons, Inc		$2,108.48
Louis Brandt & Frere		2,496.48
Reserve for Depreciation, Furn. & Fixt.		767.64
Omega Watch Boxes &c		723.14

To transfer all accounts pertaining to Omega activities from J. R. Wood & Sons, Inc.

11. At the time of the transfer, plaintiff had an unusually large inventory of watches, some of which were several years old and had to be placed on the market in competition with new merchandise coming in at lower prices in new styles and designs. Included in the inventory were some 400 or 500 white gold watches. By that time the popular style color had changed to red and yellow gold and in order to sell the movement it was necessary to purchase a new type of case.

In fixing the value of $60,000 for the inventory the employees and officials of plaintiff undertook to arrive at an approximation of a bulk cash value of those assets, taking into consideration the age of the inventory, its salability, and the poor record which that watch business had shown up to that time, though the valuation was not fixed on the basis of a detailed appraisal and it was substantially less than the existing book value.

On the open accounts pertaining to the watch business which were assigned to the Sales Corporation, the customer paid plaintiff on the invoices which had been rendered before the transfer and these amounts were credited to the Sales Corporation and applied in partial payment of the accounts receivable transferred. This procedure continued until these accounts receivable were practically eliminated.

12. No formal assignment was made to the Sales Corporation of the contract or agreement which plaintiff had with the Omega Company under which it acted as agent or distributor of the Omega watch in this country, but after the transfer of the watch business to the Sales Corporation plaintiff notified the Omega Company of the transfer and thereafter the Omega Company recognized and dealt with the Sales Corporation as its representative for the sale of the watches in this country. All orders for the purchase of watches from the Omega Company after June 20, 1932, were placed by the Sales Corporation and all correspondence concerning the purchase and importation of the watches was carried on between the Sales Corporation and the Omega Company. All orders, upon being accepted and filled by the Omega Company, were consigned to the Sales Corporation.

13. The offices of plaintiff were in a building in Brooklyn where the factory was located when the Sales Corporation was organized. About one-third or one-half of the fourth floor of the building which had theretofore been occupied by the watch department of plaintiff was occupied by the Sales Corporation without any physical change. While the Sales Corporation maintained a sort of sales room, practically no customers came to Brooklyn. The vaults and office furniture of the Sales Corporation were the same and occu-

pied the same space as had been used by the watch department of plaintiff immediately prior to the transfer.

14. The officers and directors of the Sales Corporation were the same as the officers and directors of plaintiff but because the Sales Corporation had been formed at a different time, they had been separately elected. Generally the Sales Corporation and plaintiff had their annual meetings on the same day although not at the same time. Subsequent to the formation of the Sales Corporation there were meetings of its directors at a time when there were no meetings of plaintiff when decisions were made on policy.

15. After the watch business had been transferred to the Sales Corporation it was found that stores could be selected as watch agencies which were strong enough and large enough to recommend a fine watch on their own reputation and the Sales Corporation was more successful in selling the watches to one jeweler in each town than the partnership or plaintiff had been able to do prior to June 20, 1932.

After June 20, 1932, the salesmen of plaintiff and the salesmen of the Sales Corporation operated in their own respective fields and dealt only with the articles of the respective corporations. Salesmen of the plaintiff were not permitted to sell the Omega watch and when requests were received by them from a customer for a watch a salesman for the Sales Corporation would call on the interested jeweler.

16. Except in one or two minor instances where a common service was used by the two corporations, all disbursements on behalf of the Sales Corporation were made by that corporation from its own bank account. The Sales Corporation required advances from time to time over the period of its existence to meet operating expenses and advances for that purpose were made by plaintiff and charged to the Sales Corporation on the books of plaintiff. The Sales Corporation rendered monthly statements to its customers in its own name and all invoices made up after June 20, 1932, were rendered in the name of the Sales Corporation. The Sales Corporation kept separate financial books, had its own corporate seal, and rendered its own financial statements separate from the statements of plaintiff. However, the book-

keeping was done by the same employees who did similar work for plaintiff and who had performed this work prior to the formation of the Sales Corporation.

17. The Sales Corporation paid plaintiff $2,000 a year for the occupancy of the office, storeroom space, and for the general bookkeeping, clerical, and administrative work which was done by plaintiff for that corporation. The figure of $2,000 was arrived at by measuring the space occupied by the Sales Corporation to which was added an amount for the bookkeeping, clerical, and administrative work. The charge of $2,000 was adequate to compensate for the services rendered.

18. The Sales Corporation carried its own insurance, had vaults for its merchandise separate and apart from the vaults of plaintiff, and had its own customshouse broker. Soon after its incorporation the Sales Corporation advised jewelers of the transfer of the watch business to it from plaintiff, ran advertisements, and sent advertisements to the Omega customers listed on its books. The sales manager of the Sales Corporation often requested that the offices of the Sales Corporation be moved to New York City in order to widen the separation of the watch business and the ring business but for reasons of economy this request was never complied with.

While the sales manager of the watch department of plaintiff became the sales manager of the Sales Corporation upon its incorporation, in the latter capacity he gave his entire time to the Sales Corporation and carried on that work entirely separate from plaintiff. This was also true of his assistants and the separate group of salesmen who worked under his supervision, and these employees of the Sales Corporation were paid solely by that corporation. All the details of purchasing and corresponding were handled by the Sales Corporation apart from plaintiff.

19. The watch business of plaintiff which was transferred to the Sales Corporation had not been successful prior to its transfer on June 20, 1932, and it was likewise unsuccessful after the transfer, the Sales Corporation having sustained substantial losses in each year of its existence and having a deficit at December 31, 1936, of $59,385.67. Efforts were

made by the officials of the Sales Corporation to interest additional capital in the business, including efforts to have the Omega Company put additional capital into the Sales Corporation, but they were unsuccessful. Efforts were also made by officials of the Sales Corporation to sell the watch business. There was an agreement between the Sales Corporation and the Omega Company that if the latter found an agency which would take over the watch business, the purchaser would first have to be acceptable to the Sales Corporation. The Sales Corporation finally sold the entire watch business to Norman M. Morris, Inc., in 1937 and the Sales Corporation was dissolved October 18, 1937. The proceeds of the liquidation of the Sales Corporation were paid to plaintiff in discharge of balances owing to it. Among the liabilities outstanding at the date of dissolution was the note for the $60,000 which had been given to plaintiff by the Sales Corporation at the time the watch business was transferred to it.

20. On invoices rendered by the Sales Corporation subsequent to June 20, 1932, covering sales of complete watches which had been obtained from plaintiff, no tax was computed or charged to the customer on those items, but on invoices covering in whole or in part merchandise imported by the Sales Corporation or assembled by it subsequent to June 20, 1932, a 10 percent excise tax levied under section 605 of the revenue act of 1932 was charged the customer. Consistent with such invoices, the Sales Corporation made excise-tax returns and paid excise taxes on sales of items imported by it after June 20, 1932, and on movements of watches which had been acquired on June 20, 1932, from plaintiff and cased by the Sales Corporation subsequent to its formation, but did not include a tax on the sale of complete watches which were transferred to it by plaintiff on June 20, 1932.

21. July 27, 1932, and September 22, 1932, plaintiff filed its excise tax returns under Title IV of the revenue act of 1932 for the months of June and August 1932, respectively.

22. May 16, 1935, a representative of the Commissioner of Internal Revenue transmitted to plaintiff a report showing a proposed assessment of excise tax, penalty, and interest against plaintiff of $8,111.16 on account of watches which

had been sold by the Sales Corporation from June 20, 1932, to March 1935, inclusive, which watches had been transferred by plaintiff to the Sales Corporation in the transaction heretofore referred to. June 17, 1935, the Commissioner made an assessment of tax, penalty, and interest against plaintiff of $8,177.89 on account of the liability just referred to and on June 18, 1935, and July 15, 1935, the Collector issued notice and demand for payment. After the filing of a claim for abatement which was rejected except for an allowance of $44.22, plaintiff paid the foregoing assessment July 16, 1936, in the amount of $8,133.67 which included excise taxes aggregating $6,703.25, $80.50 as a statutory penalty of 25 per cent alleged to be due for failure to file excise-tax returns for the months of June and August 1932, and interest in the amount of $1,349.92 on the additional assessment at 1 per cent per month from the alleged due dates to June 10, 1935.

July 16, 1936, plaintiff paid an additional amount of $988.05, which included $406.68 as a statutory penalty of 5 per cent for failure to pay the assessment referred to in the preceding paragraph within ten days after notice and demand, and $581.37, representing interest on the assessment of $8,133.67 from June 10, 1935, to July 16, 1936.

23. The excise taxes of $6,703.25, referred to in the preceding finding, were determined by the Commissioner to be due from plaintiff with respect to sales of complete watches which had been imported and assembled by the partnership or plaintiff prior to June 20, 1932, but which had been transferred by plaintiff to the Sales Corporation on June 20, 1932, and subsequently sold by the Sales Corporation in the period from June 1932 to March 1935, inclusive. With respect to the sales by the Sales Corporation of all other watches during that period (including watches, movements for which were transferred by plaintiff on June 20, 1932, but which were placed in cases by the Sales Corporation), the Sales Corporation has duly paid the Federal excise tax thereon, and no part thereof was ever repaid or refunded. Such taxes are not in controversy in this proceeding.

24. May 17, 1937, plaintiff filed a claim for refund of $9,121.72 representing taxes, penalty, and interest collected on July 16, 1936, as heretofore shown. That claim was

rejected by the Commissioner September 8, 1937. November 9, 1937, plaintiff filed a second claim for refund for the same taxes, penalty, and interest and that claim was rejected January 22, 1938.

25. The Sales Corporation did not include any of the additional excise taxes mentioned in the above claims for refund in the price of articles with respect to the sales for which the taxes were collected. No portion of the amount of $9,121.72 covered by the claims for refund has ever been refunded or credited to plaintiff by the defendant or repaid to plaintiff by the Sales Corporation.

The court decided that the plaintiff was entitled to recover.

Littleton, *Judge*, delivered the opinion of the court:

Upon the facts established by the record and set forth in the findings, we are of opinion that plaintiff is entitled to recover the excise taxes collected in the amount of $6,703.25 and interest of $1,349.92, together with $80.50 as the statutory penalty of twenty-five (25) percent alleged by the defendant to be due for failure of plaintiff to file excise tax returns for the months of June and August 1932. The incorporation and organization of the John R. Wood Sales Corporation by plaintiff were brought about by and were based upon a legitimate business reason resulting from certain merchandising difficulties which plaintiff had been, and then was, experiencing, as set forth in the findings. The organization of this corporation did not have for its real or primary purpose the avoidance or evasion by plaintiff of excise taxes on sales of imported merchandise. (Findings 7, 8, 9.) The facts show that in the early part of 1932, and prior to June 20 of that year, a decision to form a new corporation and to transfer the watch business to it had been reached by plaintiff's officers but no formal directors' meeting had, as yet, been held. On the morning of June 20, 1932, plaintiff's vice-president, who, with the manager of the watch department, had been immediately in charge of and familiar with the situation and the merchandising problems, secured the formal approval of the Board of Directors to the formation of a new corporation for the

handling of the watch business, and the John R. Wood Sales Corporation was organized with a capital stock of $5,000, all of which was issued to plaintiff for cash. On the same day, plaintiff and the Sales Corporation entered into an agreement under which the latter purchased the entire watch business from plaintiff for $60,000 and gave in payment therefor his demand note for $60,000.

. The watch business was only a portion of plaintiff's manufacturing and wholesale jewelry business. The watch business consisted of the watch inventory, comprising movements and cases only, complete watches, repair parts, and certain assets and liabilities having to do only with the watch part of the business. Plaintiff's business as a wholesale manufacturer of low-priced jewelry of high quality, which existed as a partnership until January 30, 1930, started in 1850 and during the period subsequent thereto it successfully sold its merchandise to the average small stores throughout the United States. In 1928 it became the exclusive sales agent for the Omega watch, which it imported. This venture resulted in serious merchandising difficulties in plaintiff's business. These difficulties are described in the findings. By reason thereof certain officials of plaintiff, including the manager of the Watch Department who first advocated the idea, discussed the advisability of forming a separate organization with a different name to handle the watch business so as to overcome these merchandising problems. This matter was considered and discussed among plaintiff's officers and directors over a considerable period of time prior to June 20, 1932. Plaintiff's directors were conservative and were not convinced at first of the necessity for the organization of a separate corporation to handle the watch business. The merchandizing difficulties continued and became such that the directors came to realize the importance of having a separate organization to take over and operate the watch business, and formal action to that end was taken on June 20, 1932. In these circumstances and in view of the facts disclosed by the record, this case is distinguishable from *Gregory* v. *Helvering*, 293 U. S. 465; *Higgins* v. *Smith*, 308 U. S. 473; and *Griffiths* v. *Helvering*,

308 U. S. 355; *Black, Starr & Frost-Gorham, Inc.* v. *United States*, 94 C. Cls. 87, and other similar cases upon which the defendant relies. We think the present case is within the rule announced by the court in *Chisholm* v. *Helvering*, 79 Fed. (2d) 14 (certiorari denied, 296 U. S. 641), in which the court, at pages 15 and 16, said:

> "*The question always is whether the transaction under scrutiny is in fact what it appears to be in form;* a marriage may be a joke; a contract may be intended only to deceive others; an agreement may have a collateral defeasance. In such cases the transaction as a whole is different from its appearance. True, it is always the intent that controls; and we need not for this occasion press the difference between intent and purpose. We may assume that purpose may be the touchstone, but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation which the apparent, but not the whole, transaction would realize. In *Gregory* v. *Helvering*, supra, 293 U. S. 465, 55 S. Ct. 266, 79 L. ed. 596, the incorporators adopted the usual form for creating business corporations; but their intent, or purpose, was merely to draught the papers, in fact not to create corporations as the court understood that word. That was the purpose which defeated their exemption, not the accompanying purpose to escape taxation; that purpose was legally neutral. *Had they really meant to conduct a business by means of the two reorganized companies, they would have escaped whatever other aim they might have had, whether to avoid taxes, or to regenerate the world.*
>
> *In the case at bar the purpose was certainly to form an enduring firm which should continue to hold the joint principal and to invest and reinvest it.* * * *
> [Italics supplied.]

In the case at bar the transaction was in fact what it appeared to be in form. The new corporation was not merely a shell or a scheme to avoid taxes. It was not intended as such. The purpose and intent in reality were to conduct the watch business by a separate corporation to the end that the merchandising problems and difficulties which had been experienced might be overcome and the watch business of the new corporation was so conducted. The fact that the organization of the new corporation had some effect

on the amount of tax which plaintiff would otherwise have to pay does not, as was held by the court in *Chisholm* v. *Helvering*, *supra*, require or justify the holding that plaintiff should nevertheless pay the excise tax upon the sales of watches by the new corporation.

In *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395, the court said:

> The fact that it is desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you may intentionally go as close to it as you can if you do not pass it.

In *Bulletin* v. *Wisconsin*, 240 U. S. 625, 630, the court also said:

> We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.

A case involving the organization of a separate corporation cannot be condemned as an evasion merely because there is no change in location of its headquarters or because it does not have new and separate officers if there is a good business reason back of what was done and upon which reason the action taken was substantially based. *Gregory* v. *Helvering*, 293 U. S. 465, and other like cases, will, upon a careful reading, show this to be true beyond question. Thus the court, in the *Gregory case*, at page 469, said:

> The legal right of the taxpayer to decrease the amount of what otherwise would be his taxes, cannot be doubted. *United States* v. *Isham*, 17 Wall. 496 506; *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395–6; *Jones* v. *Helvering*, 63 App. D. C. 204; 71 F. (2d) 214, 217. But the question is whether what was done, apart from the tax motive, was the thing which the staute intended.

Certainly what was done for the real reason it was done in the case at bar was something which the statute contemplated and intended might be done. There was a real and good business reason and the action taken was to carry out that

reason. The plaintiff may have come close to the line when it incorporated and organized the Sales Corporation at a time when a sales tax was soon to take effect but it did not pass the line, because the proof is sufficient to show that the Sales Corporation would have been created independently of the tax matter.

In the *Gregory case*, which is the basis of the subsequent cases cited and relied upon, the Court, after making the above quoted statement, pointed out, page 469, that the statute speaks of a transfer in pursuance of a plan of reorganization, "and not a transfer by one corporation to another in pursuance of a plan having no relation to the business of either, as plainly is the case here."

The court then said:

> Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character.

What was said and held in the *Gregory* and other like cases supports plaintiff's position. Thus we come to the old question of degree, but we should not lose sight of the substantial business purpose which was the underlying reason for plaintiff's action in this case, and get confused by names, faces or form, and lean too far to the assumption that the Sales Corporation was a mere fiction, and should be looked through and ignored. As the court said in *Klein* v. *Board of Supervisors*, 282 U. S. 19, 23, 24,—

> Thus we come to the usual question of degree and of drawing a line where no important distinction can be seen between the nearest points on the two sides, but where the distinction between the extremes is plain, *Hudson Valley Water Co.* v. *McCarter*, 209 U. S. 349, 355, * * *. But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members.

It is only, as the decided cases show, where the new corporation is a sham or scheme or a mere device intended primarily and fundamentally to bring about evasion that the separate corporate entity will be ignored,—mere semblance of a legitimate business motive is not enough. There was a real business purpose and motive in the J. R. Wood & Sons' action, and the mere fact that the tax problem or motive may have been present at the time final action was taken June 19, 1932 and may have served to speed action is not enough to condemn what was done as being entirely barren of substance. The evidence of record shows real substance from a business standpoint. If what was done be looked at from an income tax standpoint, it seems no one would under the circumstances question the propriety and legality of the organization of the Sales Corporation. It is only because a sales tax was about to go into effect that the tax motive is overemphasized. The fact that a new sales tax instead of an existing income tax was involved and was being newly imposed cannot serve to destroy the propriety and legality of what was done. The Agent of the Commissioner of Internal Revenue who investigated plaintiff's excise tax liability in May, 1935, found and reported to the Commissioner that upon the facts it was probably true that plaintiff would have organized the John R. Wood & Sons Sales Corporation even if the sales tax on imported watches had not been imposed. The Commissioner's written findings and decisions denying plaintiff's protests and claim for refund in respect of the tax against it show that he did not deny this. But because the Sales Corporation was organized at the time it was and because plaintiff and the new corporation had the same offices, directors and officers, he held that the Sales Corporation was only an "agent" of plaintiff. The Sales Corporation was an "agent" of plaintiff only in the sense that any corporation is the agent of its stockholders from whom it receives cash or property. The fact that two corporations carry on their separate businesses at the same location and with the same officers and directors may be evidence of a very close connection between the two corporations, and, in some cases, may be some evidence of evasion of the tax as that term is defined by the courts, but it is not conclusive. That situation may exist and

be consistent with permissible and lawful action, as we think was the case here. The evidence here covers the point. Plaintiff was in the midst of the depression. The proof shows that the Sales Corporation continued to carry on its business in the same building in which plaintiff had formerly carried on its watch business and that plaintiff and the Sales Corporation had the same officers, directors and offices for economic reasons. The question of when and under what circumstances a separate corporation should be ignored for tax purposes is an old one. Congress has long declined to say by legislation that, if the effect of reducing taxes enters into transfers of property or organization of corporations having substantial and legitimate business purposes, such transactions should be ignored for tax purposes. It is a question of intent and degree. Each case stands or falls on its facts. The courts have always carefully followed the rule that such transactions should not be ignored except where clearly justified on the ground that tax evasion was the underlying or predominant motive so that the action taken was outside the intent, if not the strict letter, of the taxing statute. We think the present case did not go beyond what the law permitted.

Judgment will be entered in favor of plaintiff for $9,121.72, with interest as provided by law. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

MENOMINEE TRIBE OF INDIANS v. THE UNITED STATES

[No. 44299. Decided October 5, 1942]

On the Proofs

Indian claims; interest on trust funds.—The Act of February 12, 1929 (45 Stat. 1164) authorizing payment of "simple interest" at 4 percent on trust funds, was not intended to apply to trust funds which were composed of and created by the deposit of interest on other funds. Plaintiff not entitled to recover interest on interest trust funds. Such interest would be compound interest.

The Reporter's statement of the case:

Mr. Ernest L. Wilkinson for plaintiff. *Messrs. Dwight, Harris, Koegel & Caskey* were on the brief.

Mr. Raymond T. Nagle, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Walter C. Shoup* was on the brief.

Plaintiff brought this suit to recover interest on certain funds, under a jurisdictional act approved September 3, 1935, which conferred on this court jurisdiction to hear, determine, adjudicate, and render final judgment on all legal or equitable claims which the Menominee Tribe of Indians might have against the United States arising under or growing out of any treaties, agreements, or laws of Congress, or out of any maladministration or wrongful handling of any of the funds, land, timber, or other property or business enterprises belonging to said tribe or held in trust for it by the United States, or otherwise.

Section 3 of that act provided that at the trial of any suit thereunder the court should apply as respects the United States the same principles of law as would be applicable to an ordinary fiduciary and should settle and determine the rights thereon, both legal and equitable, of the plaintiff tribe.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. This is one of several suits brought pursuant to the Act approved September 3, 1935, 49 Stat. 1085, as amended by the Act approved April 8, 1938, 52 Stat. 208, conferring jurisdiction upon this Court to hear, determine, adjudicate and render final judgment on all legal or equitable claims of whatsoever nature which plaintiff may have against defendant growing out of any treaties, agreements or laws of Congress or wrongful handling of the land, timber, or other property belonging to plaintiff tribe or held in trust for it by the United States or otherwise—

> * * * including, but without limiting the generality of the foregoing, * * * (2) claims for damages resulting from the improper or unlawful expenditures

of tribal trust funds, including trust funds created by the * * * Act of February 12, 1929, entitled "An Act to authorize the payment of interest on certain funds held in trust by the United States and Indian Tribes" (45 Stat. 1164); * * *

2. February 12, 1929, and continuously until December 1, 1938, defendant held in the Treasury of the United States for the use and benefit of plaintiff, three trust funds described as follows:

(a) "Interest on Menominee Fund," into which account was deposited the interest accrued and paid on the principal of a trust fund, known as the "Menominee Fund," established pursuant to the Act of Congress of April 1, 1880, 21 Stat. 70.

The Act of April 1, 1880, provided that with respect to any and all sums in possession of the defendant and held in trust for the Indian Tribes, or such funds thereafter received which were deposited in the Treasury, the defendant "shall pay interest semiannually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law."

(b) "Interest on Menominee Log Fund," into which account was deposited the interest accrued and paid on the principal of a trust fund, known as the "Menominee Log Fund," established pursuant to the Act of June 12, 1890, 26 Stat. 146.

The Act of June 12, 1890, provided that four-fifths of the net proceeds obtained by the defendant from the sale of plaintiff's logs "shall be funded into the United States Treasury, interest on which shall be allowed said tribe annually at the rate of five per centum per annum."

(c) "Interest on Menominee 4% Fund," into which account was deposited the interest accrued and paid on the principal of a trust fund, known as the "Menominee 4% Fund" established pursuant to the Act of March 28, 1908, 35 Stat. 51.

The Act of March 28, 1908, provided that any net proceeds of sales of plaintiff's timber and byproducts thereof shall be deposited in the Treasury of the United States to

the credit of the tribe entitled to the same. Such proceeds shall bear interest at the rate of four per centum per annum."

3. None of the three interest funds into which were deposited interest accrued and paid, as set out in finding 2, was an interest-bearing fund, under the Acts of April 1, 1880; June 12, 1890, or of March 28, 1908, *supra*.

All of the four interest funds mentioned in findings 2 and 5 contained balances, on February 12, 1929, in excess of $500.

4. Defendant has never paid interest on any of the three interest funds above described in finding 2.

5. A non-interest-bearing fund, known as "Fulfilling Treaties with the Menominee-Logs," was established under the Act of June 12, 1890, *supra*.

Into this fund were deposited certain of the proceeds from the sale of Menominee logs.

No interest was paid upon this fund prior to the Act of February 12, 1929, 45 Stat. 1164. From and after February 12, 1929, simple interest on principal of this fund, at the rate of 4% per annum was paid, and set up in an interest fund account, known as "Interest on Fulfilling Treaties with Menominee-Logs." No interest has been paid on this interest fund.

6. All of the funds in the four principal funds and the four interest funds mentioned and described in findings 2 and 5 were held in trust by defendant for the use and benefit of plaintiff.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

We are of opinion that plaintiff is not entitled under the provisions of the Act of February 12. 1929, to recover interest on interest. This act (45 Stat. 1164), entitled "An Act To authorize the payment of interest on certain funds held in trust by the United States for Indian tribes," provides as follows:

> That all money in excess of $500 held by the United States in a trust fund account, and carried on the

> books of the Treasury Department to the credit of an Indian tribe, if the payment of interest thereon is not otherwise authorized by law, shall bear simple interest at the rate of 4 per centum per annum from the date of the passage of this Act. The amount held in any such trust fund account, which in the judgment of the Secretary of the Interior may not be required for payment in accordance with law, shall be covered into the surplus fund of the Treasury; but so much thereof as may be necessary for making any such payment may, at any time thereafter, be restored to such account without reappropriation by Congress.

It is well settled that the United States cannot be charged with interest except where liability therefor is clearly imposed by the statute or assumed by contract. *United States* v. *North Carolina*, 136 U. S. 211; *Cherokee Nation* v. *United States*, 270 U. S. 476; *United States* v. *Worley, Administratrix, et al.*, 281 U. S. 339; *The Ute Indians* v. *United States*, 45 C. Cls. 440, 470. In *Cherokee Nation* v. *United States*, *supra*, the court said, at pp. 490, 491:

> In view of the care with which Congress and this Court in interpretation of the legislative will, have limited the collection of simple interest against the Government, *a fortiori* must compound interest be denied to appellant unless provision therefor is made in the contract of 1891, or in the statute of 1919 authorizing this suit, and it is to be found in neither.

The cases cited make it clear that a statute consenting to payment of interest refers to simple interest only, and any obligation to pay compound interest cannot be implied from general words, but must be based upon clear and unequivocal language leaving no doubt as to the intention of Congress to depart from the general rule so announced as to the right to charge and collect interest from the Government. The Act of February 12, 1929, expressly provided for only "simple interest" upon money held in trust fund accounts, and this language may not be interpreted as intending to obligate the United States to pay interest upon interest previously credited upon other interest-bearing funds or accounts. The term "simple interest" has a well-established meaning. It means interest computed solely upon the prin-

cipal. *Vaughn* v. *Graham* (Mo. App.) 121 S. W. (2d) 222, 226. Simple interest is statutory interest computed upon the principal sum. *Hovey* v. *Edmison et al.* (3 Dak. 449), 22 N. W. 594, 599.

The term "compound interest" also has a well-established meaning. Compound interest is interest on interest and signifies the adding of growing interest of any sum to the sum itself and then the taking of interest on this accumulation. It is the charging of interest against a debtor upon a sum which has accrued as interest upon the principal debt or fund. An agreement turning interest after maturity into principal, bearing interest, and the allowance of interest upon the sum of both the principal and the accrued interest is not compounding interest, as that term is generally understood and applied, but it is the payment of interest on interest money as the result of an agreement.

The stipulation for "simple interest" means that interest at the rate specified is to be paid only on one sum, or fund, and not upon a sum or fund made up of two or more elements, or parts, whereas the term "compound interest" denotes a sum, or fund, which is compounded or formed by the union of principal and accrued interest. The word "compound" is defined in the Century Dictionary as "composed of two or more elements, parts, or ingredients; not simple." It seems clear that when Congress, in the Act of 1929, consented and stipulated to pay *simple interest* only it meant, and intended, that interest should be paid or credited only on the principal of the trust fund accounts carried on the books of the Treasury Department to the credit of various Indian tribes, on which interest was not being paid under existing law. There would otherwise have been no purpose in using the term "simple interest" in specifying the rate of 4 percent per annum to be paid on such funds. The fact that the plaintiff's principal trust funds and the accrued interest funds were carried in separate accounts on the books of the Treasury does not change this situation, and plaintiff's contention that it is not claiming compound interest but only simple interest on the interest-fund accounts, on the ground that these interest accounts

were also trust funds, cannot be sustained. These interest accounts were funds held by the defendant in trust for the plaintiff tribe, but we think it is clear that they were not trust-fund accounts, as that term was used and intended in the Act of 1929, on which payment of interest was authorized.

The legislative history of the 1929 Act shows that Congress did not intend that it should be applied to trust funds made up solely of money previously credited as interest upon interest-bearing funds. The legislation related to payment of simple interest on the principal of non-interest-bearing trust funds of Indian tribes generally. The act was originally drafted and recommended by the Secretary of the Interior. In a letter transmitting the proposed bill to the Senate Committee on Indian Affairs, the Secretary stated as follows:

> There is submitted herewith draft of a proposed bill to authorize the payment of interest on certain funds held in trust by the United States for various Indian tribes. As shown by accompanying statement, the Government is holding a large amount of money belonging to various tribes of Indians throughout the United States, no part of which is drawing any interest, and it is felt by this department that the Government, as guardian of the Indians, is not doing full justice to its wards by holding and using this money without compensation to them. It is conceded that there is no legal obligation to pay interest on these funds, but the fact that the Government has obligated itself to pay interest on other funds of similar origin would appear to constitute a moral obligation which is now only partially fulfilled. (See House Report 2320, 70th Cong., 2d Sess., Cong. Doc. 8979.)

The "accompanying statement" which was transmitted with the above-quoted letter was entitled "Statement of non-interest-bearing tribal funds in United States Treasury" and listed more than one hundred and thirty funds held for various Indian tribes, none of which was made up of money previously allowed as interest on the principal of interest-bearing funds.

For the reasons stated, we are of opinion that plaintiff is not entitled to recover interest at the rate of 4 percent per

annum upon the interest funds which the defendant held and carried on the books of the Treasury to the credit of plaintiff tribe.

The petition is therefore dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

WISCONSIN BRIDGE & IRON CO. v. THE UNITED STATES

[No. 44322. Decided October 5, 1942]

On the Proofs

Government contract; specifications, completeness of.—In contract for construction of highway bridges, it is *held* that there was no warranty by defendant that specifications contained all information necessary for plaintiff to make bid.

Same; extras; protest by plaintiff.—Where plaintiff did work demanded without protest, as required by the contract, and without requesting written order, plaintiff may not recover as for an extra.

The Reporter's statement of the case:

Mr. George Maurice Morris for the plaintiff. *Mr. John H. Pratt* and *Morris, KixMiller & Baar* were on the briefs.

Mr. Edward L. Metzler, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a Wisconsin corporation with its principal office at Milwaukee, Wisconsin.

2. October 19, 1935, the United States Engineer Office, War Department, Philadelphia, Pa., issued the standard Government form of invitation for bids for the reconstruction of three highway bridges located, respectively, near Reedy Point, at St. Georges and at Summit, Delaware, over the Chesapeake and Delaware Canal, a navigable, sea-level waterway, approximately 19 miles long and about 41 miles below Philadelphia. The invitation was accompanied by

specifications covering the proposed reconstruction work, and it made reference to 13 drawings on file in the United States Engineer's office. It provided that sealed bids would be received until 1:00 p. m. on November 18, 1935, when they would be publicly opened.

In response to the invitation and the specifications and drawings and the addendum issued November 6, 1935, plaintiff on November 15, 1935, submitted its bid of approximately $174,324 on a unit-price basis. Its bid was accepted and a written contract, dated December 14, 1935, was executed by the United States by Captain C. W. Burlin, Corps of Engineers, and by plaintiff by its vice president and manager, A. L. Riemer. The contract was approved December 27, 1935, by Col. George R. Spalding, Corps of Engineers, Division Engineer, North Atlantic Division.

3. The contract provided that plaintiff would furnish all labor and materials and perform all work necessary to complete the reconstruction of the superstructure of the side span trusses for both the Reedy Point and St. Georges vertical lift bridges; remove the existing abutments and construct new abutments at Reedy Point and St. Georges Bridges; strengthen both main piers of St. Georges Bridge and the north pier of Summit Bridge; and remove necessary existing roadway paving and fill, pave roadways and sidewalks and do all other work necessary to place the bridges in complete operation.

Work under the contract was to commence within 20 calendar days after receipt of notice to proceed and was to be completed within 250 calendar days from the date of receipt of notice to proceed. Plantiff received such notice on December 30, 1935, which fixed the commencement date as January 19, 1936, and the completion date as September 5, 1936. Plaintiff's first superintendent arrived on the job January 3, 1936, and with a crew of six started work the next day. Until January 23 plaintiff was engaged in erecting field buildings, bringing in tools, and removing riprap in the canal. The first equipment arrived about January 17. Because of bad weather, work was suspended from January 23 to March 9, when it was resumed. Excavation started March 22. The crane was not brought to the

site until about March 23 on account of the condition of the roads. Due to these weather conditions, a strike, and additional work the contract time was extended 99 days, to December 13, 1936. The contract was not completed until March 11, 1937, 88 days subsequent to the contract period as extended. For this delay defendant deducted from the final payment the amount of $8,800 representing liquidated damages at the rate of $100 per day for the 88 days' delay.

4. Article 2 of the contract provided:

> ART. 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

The "General Provisions" of the specifications contained the following:

> 6. DRAWINGS.—(a) *Contract drawings.*—The work shall conform to drawings, hereinafter called "contract drawings," marked "Inland Waterway from Delaware River to Chesapeake Bay, Del. & Md.," in 13 sheets as follows: [Here the 13 drawings are described.]
>
> The above drawings form a part of the specifications, and are filed in the United States Engineer Office at 900 Custom House, 2d and Chestnut Streets, Philadelphia, Pa.
>
> The contractor shall check all contract drawings and shall report any errors or omissions to the contracting officer, who will make or approve the necessary corrections. The contractor shall be responsible for any errors in the contract drawings not so reported.

(b) *Working drawings.*—The contractor shall prepare such detail working drawings, shop plans, etc., as are necessary to fabricate, erect, and construct all parts of the work in accordance with the contract drawings and the specifications, and shall submit to the contracting officer for approval three prints of each drawing. After drawings are approved the contractor shall furnish the contracting officer six additional prints. No field work shall be commenced until the drawings in connection therewith have been approved and no materials shall be ordered from the mills until the shop plans covering such materials have been approved. Alterations of the approved drawings shall not be made without the written consent of the contracting officer. The United States will not be responsible for errors in contractor's drawings, even though approved.

* * * * *

Details of design not otherwise shown or specified shall be in accordance with the Conference Specifications for Steel Highway Bridges adopted by the American Railway Engineering Association and the American Association of State Highway Officials, dated March 12, 1929.

(c) *Construction plans.*—The contractor shall prepare such working drawings as are necessary to show in detail the temporary work and methods of construction he proposes to use. In order to satisfy the contracting officer that the plans and methods he proposes using in constructing the work will furnish a completed structure in strict accordance with the contract plans and specifications, and within the time required, the contractor shall submit such working plans to the contracting officer for examination. Such examination by the contracting officer shall not relieve the contractor of any of his responsibility to complete the construction in strict accordance with the contract plans and specifications.

7. PHYSICAL DATA.—The mean range of tide in the canal is 5.2 feet at the Delaware River end and 2.3 feet at Chesapeake City. The maximum velocity of the normal tidal current is about 2 miles per hour. The locality is sheltered from storms and wave action. During unusually cold weather the canal is sometimes closed by ice for short periods during the winter. The bridges to be reconstructed are of the vertical lift type, having a vertical clearance of 140 feet at mean low water and a minimum horizontal clearance of 175 feet.

* * * * *

42. GENERAL.—The contract drawings show temporary sheet pile cofferdams inside of which it is contemplated that the work of strengthening the main piers will be carried on; however, the contractor may elect to use such other methods of construction as will furnish a completed structure in strict accordance with the plans and specifications. The contractor's method of construction shall be submitted to the contracting officer in order that he may be assured that the proposed methods will be satisfactory.

The contract plans and specifications propose the use of steel pipe piles for the strengthening of the main piers. The contractor may, subject to the approval of the contracting officer, use other types of piles of equivalent strength and quality to the steel piles specified herein.

The concrete collars around the main piers are shown anchored to the existing caissons by expansion type anchor bolts. Other types of expansion bolts, which will secure positive anchorage, may be submitted to the contracting officer for his approval.

5. The plans and specifications for this project were prepared under the general direction of District Engineer John C. H. Lee, an army engineer of extensive experience in construction work, and his staff, in conjunction with the firm of Modjeski, Masters & Case, Inc., consulting engineers, also of wide experience in this kind of work. The plans called for the strengthening of the piers with concrete-filled steel pipe piles driven in rows around each pier and capped with reinforced concrete collars securely anchored to the piers by means of keys and anchor bolts. They indicated that the work might be performed within cofferdams; but the design and the material out of which the cofferdams were to be constructed were not shown; nor were dimensions for the cofferdams shown thereon in figures. The drawings, however, were drawn to scale, and if the cofferdams indicated were scaled they showed a height above mean low water at the north and south piers of the St. Georges Bridge of 6 feet 2 inches, and a height of 3 feet 3 inches above mean low water at the Summit Bridge. It was not intended by the contract drawings to require a cofferdam, nor, if one were used, to specify the height thereof or any of its other dimensions or design, nor the

materials out of which it was to be constructed, nor could they fairly be construed to do so.

The use of cofferdams in the doing of the work was optional with the contractor, and the kind of cofferdams to be used was optional, except that the contractor was required to submit to the contracting officer his proposed method of construction and working drawings thereof in order that the contracting officer might determine whether or not under the proposed plan the required work could be done within the time allowed.

6. The specifications in article 7 provided:

> The mean range of tide in the canal is 5.2 feet at the Delaware River end and 2.3 feet at Chesapeake City. The maximum velocity of the normal tidal current is about 2 miles per hour. The locality is sheltered from storms and wave action. During unusually cold weather the canal is sometimes closed by ice for short periods during the winter. * * *

No information was given as to the extreme high tide to be expected. Such information was on file in the office of the Chief of Engineers and was contained in the reports of the Chief of Engineers for 1934 and 1935. These reports were public documents. They read in part as follows:

> The mean range of tide at Reedy Point jetties is 5.2 feet and at Chesapeake City, Md., 2.2 feet. The extreme range of tide is from 3.9 feet above mean high water to 2.2 feet below mean low water.

Mean low water at the St. Georges Bridge was elevation +0.7, and at the Summit Bridge was elevation +1.5. This was shown on the drawings. From this information the extreme range of tide could be easily computed. It showed an extreme range of slightly more than 9 feet above mean low water. The defendant did not advise plaintiff of this extreme range of tide until the plaintiff submitted construction plans for the construction of the cofferdams.

7. Plaintiff was required by the specifications to prepare working drawings "to show in detail the temporary work and methods of construction he proposes to use." These it was required to submit to the contracting officer in order to satisfy him "that the plans and methods he proposes

using * * * will furnish a completed structure in strict accordance with the contract plans and specifications, and within the time required." Pursuant thereto plaintiff's working drawings and construction plans were called for by the contracting officer on December 30, 1935, the date plaintiff was given notice to proceed. On January 10, 1936, plaintiff submitted to the contracting officer its working drawings C1, C2, and C3, showing the detailed designs of the cofferdams, their dimensions and elevations, construction material, plan of excavation, and steel sheet piling layouts. According to these drawings the cofferdams were to be constructed of steel sheet piling 27 feet long, the same piling to be used in all three cofferdams. At the north and south piers of St. Georges Bridge and at the north pier of Summit Bridge the sheet piling was to extend to an elevation of 4 feet, 6 feet 2 inches, and 5 feet 3 inches, respectively, above mean low water, and was to be embedded 5 feet 6 inches, 6 feet 6 inches, and 5 feet 6 inches, respectively, below both the excavation within the cofferdams and the lowest wale in place.

The contracting officer sent plaintiff's drawings to defendant's consulting engineers who had prepared the original contract drawings, and on January 17, 1936 defendant's consulting engineers, after an examination of plaintiff's drawings, advised the contracting officer as follows:

> We have examined these drawings [C1, C2, and C3] and have marked on them some suggested changes which are principally as follows:
>
> From your Mr. Parsons [one of defendant's engineers], we ascertained that during the last three years six tides per year have exceeded eight feet in height, and that once or twice a year the tides have been over nine feet. We believe, therefore, that the cofferdams should be built to take a tide of at least 8½ feet without flooding. For this tidal height the sheet piling proposed by the Wisconsin Bridge has adequate strength, but the timber wales and struts shown on their drawings are greatly overstressed. We have therefore recommended that the strength of the wales be increased by making these of double timbers where additional strength is required. We have suggested this method of strengthening since we believe that the contractor

> spaced his struts so as to obtain maximum working room. If the maintenance of this working space were not required, the same result could be accomplished without increasing the strength of the wales, by introducing additional struts between those shown.

On January 20, 1936 the contracting officer wrote the plaintiff in part as follows:

> You are requested to revise drawings Nos. C1 and C3 in accordance with the enclosed letter and changes marked on the returned plans in respect to the bracing and length of piles of the cofferdams. The elevation of the top of the cofferdams, however, which is marked on the drawings at +8.5 feet [it] is believed should be +10.0 feet for protection against wave wash by passing boats and possible extreme tide conditions. Your attention is invited to the increased length of the piling in the cofferdams, and also to the increased depth of excavation necessary on the shore side of piers for placing the piling under the trusses.

With his letter was enclosed a copy of the letter from the consulting engineers.

In response thereto plaintiff on January 29, 1936 submitted to the contracting officer revised drawings C1 and C3, which provided for increasing the height of all cofferdams to elevation +9.5 and increasing and strengthening the wales near the top of each cofferdam; increasing the height of the cofferdams to be erected at the north and south piers at St. Georges Bridge and at the north pier at Summit Bridge from 4 feet, 6 feet 2 inches, and 5 feet 3 inches, respectively, above mean low water to elevations of 8 feet 10 inches above mean low water at the north and south piers at St. Georges Bridge and 8 feet above mean low water at the north pier at Summit Bridge. February 13, 1936 these revised drawings were forwarded by the contracting officer to his consulting engineers, who on February 15 returned them with approval to the United States Engineer Office. They were forwarded to plaintiff February 18, 1936, with the approval of C. D. Parsons, United States Engineer Office, Philadelphia, who was the authorized representative of the contracting officer. February 21, 1936, plaintiff wired its foreman to place orders for timber to be used on this contract work.

8. On October 2, 1936 the contracting officer changed the specifications to read as follows:

> 1-07. PHYSICAL DATA.— * * * The mean range of tide in the canal is 5.2 feet at the Delaware River end and 2.3 feet at Chesapeake City, *but the tide has been known to reach a height of 9 feet above mean low water.* [The italicized portion is the portion added.]

9. At the time the changes in the cofferdams were requested by the contracting officer, plaintiff made no protest, nor did it claim any extra work was being demanded of it at any time during the progress of the work.

Article 5 of the contract reads as follows:

> *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 30 of the specifications reads:

> CLAIMS AND PROTESTS.—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately, and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling. (See arts. 3 and 5 of contract.)

However, when defendant on July 26, 1937 paid the plaintiff the final amount determined by it to be due, the plaintiff accepted the amount as final payment, with the following reservation:

> Confirming the writer's telephone conversation with Mr. Sutton this morning, we wish to assure you that we appreciate your promptness in sending us check #35930, dated July 26, 1937, for $18,016.08, receipt of which is hereby acknowledged.
>
> In accordance with our agreement over the telephone, we are depositing this check with the understanding that it will in no way preclude our rights for making further claims and our formal protest is as follows:
>
> "We protest the payment of this amount as full satisfaction and payment of any and all claims arising from our operations under these contracts, and by accepting

said payment do not waive any of our rights for the full amount of damages and additional compensation to which we are entitled, and you are notified that we intend to make claim for additional damage and compensation because of misrepresentations and breach of warranty contained in the contract with reference to the height of the tide and wave action. We are depositing this check in accordance with your permission over the telephone."

Further in accordance with our understanding with Mr. Sutton over the telephone, you will place this letter in your files after acknowledging receipt of it, and we will then be entitled to make our claim just as soon as we see fit to do so and have had time to get it prepared. Again thanking you for your kind cooperation, we are * * *.

In reply thereto Lieutenant Colonel John C. H. Lee, Corps of Engineers, District Engineer, wrote plaintiff on July 31, 1937 in part as follows:

> Your letter will be filed with voucher No. 8 of the Philadelphia ERA account of Captain C. W. Burlin, Corps of Engineers, for July 1937, covering final payment under the contract, and will serve to protect any claim that you may have for additional payment.

10. The schedule of operations under the contract allowed 250 days for completion, the work to be performed in the following manner:

1. The north pier of the St. Georges Bridge was to be reinforced in 80 days, followed by the south pier in 80 days, and then the north pier of Summit Bridge in 90 days;
2. The new abutment was to be constructed and the existing abutment was to be removed at the north side of St. Georges Bridge in 60 days, at its south side in 60 days, at the north side of Reedy Point Bridge in 60 days, and at its south side in 70 days, all in a consecutive manner; and
3. The steel work at the St. Georges and Reedy Point Bridges was to be done at the same time that the south abutments at these bridges were constructed and removed, *that is, at St. Georges between the 80th and 120th* days of the contract, and at Reedy Point Bridge between the 200th and 250th days.

According to this schedule the north abutments at St. Georges Bridge were to be finished between December 31, 1935 and February 28, 1936, but subcontracts involving the construction of all the abutments were not made before January 9, 1936, and work did not start until May 25 and was not completed until December 31, a period of 201 rather than 60 days. The St. Georges south abutments were commenced June 17, 1936, and completed February 1, 1937, 231 instead of 60 days, as scheduled, and the Reedy Point abutments, scheduled to start after the completion of the St. Georges abutments, were commenced about April 20, 1936, and completed March 8, 1937, 323 rather than 130 days. The steel work at St. Georges and Reedy Point was started May 15 and June 17, 1936, respectively, and the painting thereof was completed January 16, 1937, or in 247 and 215 days, respectively, instead of 40 and 50 days, as scheduled.

11. During the time final plans for the cofferdams were being agreed upon work was suspended on account of bad weather. It was suspended on this account from January 23, 1936 to March 9, 1936. The contracting officer promptly acted upon plaintiff's proposed construction plans. The defendant was not responsible for any delay in completing the contract. The proof does not show that plaintiff should be excused for any delay except those for which extension of time was granted. The extensions of time granted by the contracting officer were agreed to by the plaintiff. These extensions were embodied in change orders, each of which recited that, except as changed, "all other terms and conditions of said contract * * * shall be and remain the same."

12. On June 25, 1938, Congress passed an Act (52 Stat. 1395) which reads as follows:

> That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment upon the claim of the Wisconsin Bridge and Iron Company, of Milwaukee, Wisconsin, arising out of contract Numbered ER-W-697 eng. 23, dated December 14, 1935, for the reconstruction of three highway bridges over the Chesapeake and Delaware Canal, for damages alleged to be the result of misrepresenta-

> tions contained in the specifications and plans for said work, for work performed on orders from the contracting officer for the Government in addition to that required by said contract, and for losses alleged to be the result of delays because of orders from the contracting officer for the Government requiring the performance of additional and experimental work not required by the contract and the payment to claimant of a penalty deducted from the final payment for alleged failure to complete the work within the contract time.

When this bill was pending before the Claims Committee of the Senate, the Secretary of War was requested by the Chairman of this Committee to give his views thereon. In reply he wrote the Committee in part as follows:

> However, as a result of a conference in the office of the Chief of Engineers with representatives of the Wisconsin Bridge & Iron Co., it appears that a further purpose of the proposed bill is to enable the claimant to present to the Court of Claims certain matters arising during the contract period that were not administratively adjusted at that time.
>
> Under these circumstances, the Department entertains no objection to favorable consideration of proposed bill S. 3937.

The only matters not administratively adjusted by the Secretary of War were plaintiff's present claim arising out of the changes in the cofferdams requested by the contracting officer and the amount of liquidated damages deducted.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues the defendant for $61,280.99. The amount of $8,800 thereof is for liquidated damages deducted by the defendant for 88 days' delay in completing the contract hereafter described. The balance of $52,480.99 is the cost of doing alleged extra work and damages due to the delay said to have been incident to the doing of this alleged extra work.

The main controversy is over whether or not the plaintiff was required to do work not called for by the contract.

This the plaintiff claims was the building of certain cofferdams to a height above low water greater than it had originally planned to build them.

The contract required the plaintiff, among other things, to strengthen both main piers for the St. Georges Bridge and the north pier of the Summit Bridge. Contract drawing No. 4 set forth the work to be done in strengthening the main piers for the St. Georges Bridge, and contract drawing No. 5 showed the work to be done in strengthening the main pier at the Summit Bridge. As a part of these drawings there was indicated by dotted lines temporary cofferdams inclosing the work to be done. No details, dimensions nor design were given for these cofferdams, but plaintiff says that since the drawings were drawn to scale, it was possible to ascertain their height above mean low water by scaling them. By doing so, it ascertained the height at the St. Georges piers to be 6 feet 2 inches, and the height at the Summit pier to be 3 feet 3 inches.

When the plaintiff submitted working drawings for these cofferdams, as it was required to do by section 6 (c) of the specifications, it showed a cofferdam for the north pier at the St. Georges Bridge which extended 4 feet above mean low water mark, and one which extended 6 feet 2 inches above mean low water for the south pier at the St. Georges Bridge, and one which extended 5 feet 3 inches above mean low water at the Summit Bridge.

The contracting officer sent these plans to his consulting engineer for comment. The consulting engineer advised the contracting officer that in the last three years there had been six tides a year in the Canal which exceeded 8 feet in height, and one or two a year which had been over 9 feet; therefore, he advised that the cofferdams should be built high enough to protect against a tide of 8½ feet. This increased height he said would require the strengthening of the wales and struts in the cofferdams. Upon receipt of this letter the contracting officer wrote the plaintiff requesting it to revise its drawings by increasing the height of the cofferdams to 10 feet above sea level. In response thereto the plaintiff submitted revised drawings for the three cofferdams increasing the height of all of them to 9½ feet above

sea level. This increased the height of the cofferdams at both piers of the St. Georges Bridge to 8 feet 10 inches above mean low water, and at the Summit Bridge to 8 feet above mean low water.

The plaintiff says that this request for increased height of the cofferdams was extra work, for which it should be compensated. In support of its position it relies upon two things: (1) the provisions of article 7 of the specifications, which provides: "The mean range of tide in the canal is 5.2 feet at the Delaware River end and 2.3 feet at Chesapeake City"; and (2) the height of the cofferdams as indicated on the contract drawings.

Plaintiff's original position seems to have been that the quoted provision of the specifications was a misrepresentation of actual conditions, but this clearly is not true. The testimony shows without controversy that the mean range of tide was exactly that stated in the specifications. This was not a representation as to the maximum tide to be expected, but only as to the mean range of tide. The use of the words "mean range" carries a necessary implication that sometimes tides ranged above the mean range, because the mean range is the range midway between the low range and the high range, or the average range determined by adding together all the ranges and dividing by the number added together. This, of course, indicates that sometimes the tide ranged above the "mean" or the average range, and sometimes lower. What is meant by "mean range" is clearly explained in the pamphlet of the United States Coast and Geodetic Survey, "Instructions for Tide Observations." At page 2 this publication says:

> The "range of tide" is the difference in height between a high water and a preceding or following low water.
> The "mean range" is the average difference in the heights of high and low water at a given place.
> The range of the tide at any given place varies from day to day. Variations in the range may at times be caused by varying meteorological conditions, but the principal variations are brought about by astronomic causes—variations in the relative positions of moon, sun, and earth. At the times of new and full moon the sun and moon are in line relative to the earth, and their

> tidal forces are then in concert, causing the tides to rise higher and fall lower than usual, so that the range at this time is greater than the average. These tides are known as "spring tides" and the range the "spring range."

This provision of the specifications clearly was not a representation as to the maximum tide that might be expected.

The plaintiff further says that the defendant knew what was the maximum height to be expected, and that it was its duty to furnish plaintiff this information. In the first place, as pointed out above, the representation made in the specifications as to the tides put plaintiff on notice that it might expect higher tides than the mean high tide. This imposed upon plaintiff the duty to make inquiry as to the height of the tide that might be expected, if it thought this information was necessary.

It is not true, as plaintiff says, that the defendant warranted that its specifications and drawings would give plaintiff all the information that was necessary for it to have in order to bid.

The cases cited by plaintiff do not so hold. *Hollerbach* v. *United States*, 233 U. S. 165, and *Christie* v. *United States*, 237 U. S. 234, hold merely that the contractor should be relieved if misled by erroneous statements in the specifications. There were no erroneous statements in these specifications.

In *United States* v. *Spearin*, 248 U. S. 132, the contractor had been directed to build a certain sewer at a certain place and according to certain specifications. He built it as specified, but it proved inadequate to carry off the water and the site of the work was flooded. His contract was cancelled because he insisted the defendant should bear the cost of remedying the defect. The court held he was entitled to recover damages therefor. This was plainly correct because the damage resulted from an inadequate structure built according to specifications prepared by the defendant.

Steel Products Eng. Co. v. *United States*, 71 C. Cls. 457, goes no further than the *Spearin* case.

Moreover, the contract did not require plaintiff to use cofferdams in the construction of the work, and, since infor-

mation as to the height of tides to be expected was necessary only if cofferdams were to be used, there was no obligation on defendant to give plaintiff this information until it knew plaintiff was to use cofferdams. Section 42 of the specifications provide:

> The contract drawings show temporary sheet pile cofferdams inside of which it is contemplated that the work of strengthening the main piers will be carried on; however, the contractor may elect to use such other methods of construction as will furnish a completed structure in strict accordance with the plans and specifications. * * *

Until the defendant knew that the plaintiff intended to use cofferdams, certainly there was no duty upon it to give plaintiff information necessary only in the event cofferdams were to be used. When the defendant learned that plaintiff did expect to use cofferdams, it promptly gave it the information as to the height of the tides to be expected.

In order to demonstrate that the increased height of the cofferdams was extra work, plaintiff relies mainly upon the above quoted provision of the specifications. To a lesser extent it relies upon the contract drawings which indicated cofferdams within which the contract work was to be constructed. As stated, no dimensions were given for these cofferdams, but when the drawings were scaled they showed a height above mean low water for the piers of the St. Georges Bridge of approximately 6 feet 2 inches, and 3 feet 3 inches for the pier of the Summit Bridge. It is, however, clear, we think, that this was not a requirement as to the height the cofferdams were to be constructed above low water mark. In the first place, the contractor was not required to build any cofferdams at all and, therefore, of course the drawings cannot be construed to have required it to build any particular type or height of cofferdam.

Moreover, the testimony is quite clear that the indication of cofferdams was nothing more than an indication of how the contract work might be constructed, and was not a requirement of how it should be constructed. Being merely an indication of what the contractor might want to do, no

attempt was made to specify definitely the dimensions of the cofferdams, nor of their design, nor of the materials to be used in constructing them.

The obligation of preparing the drawings for the temporary work to enable the contractor to perform the work required by the contract was on the contractor. Since this was the obligation of the contractor and since the defendant when it prepared the contract drawings did not know whether or not the contractor would use cofferdams, of course no effort was made to specify dimensions, height, materials, or the design of them. The contract drawings merely indicated that the work might be constructed within cofferdams; but the kind of cofferdams that would be required the defendant did not undertake to state. It took no action with respect to this until the contractor submitted its plans for the cofferdams it proposed to use.

When these plans were submitted by plaintiff, the contracting officer "requested" certain amendments therein so as to prevent the flooding of the cofferdams. The testimony shows that frequently cofferdams are not built high enough to take care of all high water, because frequently it is uneconomical to do so, the parties preferring to let the cofferdams be flooded occasionally rather than go to the extra expense. The contracting officer in this case, however, thought that if these cofferdams were built to the height proposed by plaintiff they would be so frequently flooded that the plaintiff would not be able to properly do the work required within the time allowed. Therefore, he "requested" the contractor to change its plans. We cannot say that this was a demand on the part of the contracting officer; it was not framed as a demand, but as a request; but whether or not a demand, it was acceded to by the plaintiff without protest and without claim being made that extra work was being required of it.

Evidently the plaintiff thought that the demand, if such it was, was one which the contracting officer was authorized by the contract to make. Plaintiff never made any claim that more was being required of it than was authorized by the contract until over four months after the entire contract

had been completed. This was over 18 months after the particular work was done. Plainly, plaintiff did not think that more was being required of it than the contract authorized.

Plaintiff's failure to make any protest is all the more indicative in view of the provisions of article 5 of the contract, providing that "* * * no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order," and in view of the provisions of article 30 of the specifications, which provides:

> If the contractor considers any work required of him to be outside the requirements of the contract * * * he shall ask for written instructions or decision immediately, and then file a written protest with the contracting officer against the same within ten days thereafter, or be considered as having accepted the record or ruling.

Since the contractor did not make any protest against building the cofferdams higher, it must be "considered as having accepted the record or ruling."

The plaintiff is not entitled to recover on this item.

The plaintiff also sues to recover liquidated damages deducted in the amount of $8,800 for 88 days' delay. In its petition it says:

> * * * Any and all delays in the plaintiff's performance for which the plaintiff was penalized were due entirely to the aforesaid changes in the specifications and plans which said changes were made by the War Department, United States Engineer Office, subsequent to the execution of said contract. * * *

As we have said above, the responsibility for drawing plans for the necessary cofferdams was a responsibility on the plaintiff and, therefore, the delay in perfecting plans for proper cofferdams was plaintiff's fault, unless defendant unduly delayed approving them. The proof shows that the contracting officer was prompt in acting upon plaintiff's proposed plans. He requested these plans on December 30, 1935, the date he gave notice to proceed. They were furnished on January 10, 1936. A week later the consulting

engineer, after reviewing them, forwarded his suggested changes to the contracting officer. Within three days thereafter the contracting officer wrote the plaintiff requesting changes along the lines of those proposed by the consulting engineer. Nine days later these revised drawings were submitted by the plaintiff. These were forwarded by the contracting officer to the consulting engineers on February 13, 1936. They were returned by the consulting engineers with their approval on February 15, 1936, and were forwarded to plaintiff by the contracting officer with his approval on February 18, 1936. It appears from this that the contracting officer acted promptly, except, perhaps, in forwarding plaintiff's revised plans to the consulting engineer. He received these plans on January 29, 1936, and forwarded them on February 13, 1936; but this delay, if unreasonable, is immaterial, because the work was suspended from January 23, 1936 to March 9, 1936 on account of bad weather. Any unnecessary delay, therefore, between January 29, 1936 and February 13, 1936 had no effect upon the completion of the contract. Time for its completion was extended by the contracting officer on account of the delay due to bad weather from January 23, 1936 to March 9, 1936.

Since it was not the fault of the contracting officer that the drawings for the cofferdams were not correct in the first place, and since the contractor was delayed by bad weather during the entire time correct drawings were in course of preparation, it cannot be said that the delay incident to approval of the plans was the fault of the defendant.

Nor was plaintiff delayed because more was required of it than the contract called for, as we have heretofore pointed out.

Whatever may have been the cause of the delay, whether or not it was due to the incompetency of the plaintiff or to its lack of organization of the work, as defendant alleges, it has not been shown that the delay was due to the act of the defendant, as plaintiff alleges, nor, for that matter, to any other cause for which plaintiff should be excused.

Syllabus

It results, therefore, that plaintiff is not entitled to recover the liquidated damages deducted.

Plaintiff's petition must be dismissed. It is so ordered.

Madden, *Judge;* Jones, *Judge;* and Whaley, *Chief Justice*, concur.

Littleton, *Judge*, dissents.

OIL CITY NATIONAL BANK AND NELL P. HEASLEY, EXECUTORS OF THE ESTATE OF HARRY HEASLEY, DECEASED, v. THE UNITED STATES

[No. 44623. Decided October 5, 1942]

On the Proofs

Income tax; income from corporation dividends including special distribution; assessment on basis of earnings prorated.—Where taxpayer, decedent, a stockholder in an oil company, in his income tax return for 1934 included as income dividends received from said oil company, including four regular quarterly dividends and a special distribution paid out of cash received chiefly from the sale of three certain leases; and where in arriving at the amount of earnings available for dividend payments in each of the years 1920 to 1933, inclusive, the Commissioner of Internal Revenue averaged said oil company's total income for the year from all sources, including sale of leases, treating said income as accruing ratably throughout the year; and where for the year 1934 the Commissioner used the same method as to the four regular quarterly dividends but did not treat the profits from the sale of said three leases as having accrued ratably; it is *held* that the plaintiffs, executors, are entitled to recover. *Gardner Governor Co.* v. *Commissioner*, 5 B. T. A. 70, cited; *Mason* v. *Routzahn*, 275 U. S. 175, and *Edwards v. Douglas*, 269 U. S. 204, distinguished.

Same; method previously used by Commissioner.—Taxpayer was entitled to the usual method of prorating the profits over the year and to have the tax levied on the basis of the net earnings for the year in accordance with the method used by the Commissioner of Internal Revenue in calculating the tax for the previous several years.

The Reporter's statement of the case:

Miss Helen Goodner for the plaintiff. *Messrs. Geo. E. H. Goodner* and *D. F. Prince* were on the brief.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. March 2, 1939, a petition in this case was filed by Harry Heasley of Emlenton, Pennsylvania, as plaintiff, who died on April 19, 1941. Oil City National Bank of Oil City, Pennsylvania, and Nell P. Heasley of Emlenton, Pennsylvania, executors of the estate of Harry Heasley, deceased, were duly substituted as parties plaintiff.

2. March 15, 1935, the decedent filed an income tax return for the calendar year 1934 with the Collector for the Twenty-third District of Pennsylvania. The return disclosed a taxable net income of $49,462.75, and a tax liability of $6,899.32. The tax was duly paid by decedent in installments during the year 1935.

3. After 1935, additional income taxes for the year 1934 were assessed against the decedent, which were paid in 1936 and 1937. The total income taxes and interest paid by the decedent for the year 1934 are as follows:

Date	Tax	Interest
Mar. 15, 1935	$1,724.83	
June 5, 1935	1,724.83	
Sept. 4, 1935	3,449.66	
Oct. 19, 1936	9,304.96	
Dec. 11, 1936		$883.97
Mar. 24, 1937	18,827.17	2,271.64
Total	35,031.45	3,155.61

4. In the year 1934, Harry Heasley, the decedent, received dividends from the Devonian Oil Company amounting to $124,505.

The Commissioner of Internal Revenue determined that 74.0548% of the $124,505, or $92,201.93, was taxable, and that the balance, representing return of capital, was nontaxable.

The Commissioner included the $92,201.93 in decedent's income for 1934 as part of the total taxable dividends of $112,742.32.

5. June 7, 1938, the decedent filed a claim for refund of $18,525.92 of the taxes paid by him for the year 1934. In support of this claim decedent stated that "of the dividends received from the Devonian Oil Company in the year 1934 aggregating $124,505, the taxable portion under the law was $54,010.27, or 43.38% of the aggregate." The claim for refund, Exhibit E to the stipulation of facts, was rejected on March 29, 1939.

All exhibits herein referred to are made a part of this finding by reference.

6. In a letter to the Devonian Oil Company dated January 20, 1938, plaintiff's Exhibit 1, the Commissioner of Internal Revenue set out the computation of the net income or loss of that company for the period June 3 to December 31, 1920, and for each of the years 1921 to 1934, inclusive. The letter also set forth the Commissioner's determination of distributions made to stockholders of the Devonian Oil Company for each of the years involved and the amounts of such distributions which were paid out of earnings and the amounts which were paid out of capital.

7. From 1920 to 1934, inclusive, the Devonian Oil Company was engaged in the buying and selling of oil and gas leases and in the production and sale of crude oil. During the years 1925 to 1934, inclusive, it disposed of numerous capital assets. The following is a summary for each of these years of the number of transactions, the cost of such assets, the accrued depreciation, the accrued depletion, the selling price, and the profit or loss realized:

Year	Number of transactions	Total cost	Accrued depreciation	Accrued depletion	Selling price	Profit	Loss
1925	19	$68,409.59	$8,187.03	$1,548.34	$12,683.81		$45,990.41
1926	26	115,040.98	24,224.10	7,297.72	106,750.00		23,230.84
1927	33	124,899.93	42,222.07	20,968.18	9,380.00		52,329.68
1928	64	314,181.63	62,807.71	31,331.48	193,124.35		26,917.69
1929	39	309,832.10	137,891.49	72,155.37	118,325.97	$18,540.73	
1930	25	87,289.66	24,300.19	36,932.07	53,660.66	27,603.24	
1931	45	173,421.79	31,565.00	69,317.46	193,634.46	121,095.13	
1932	36	175,831.95	135,472.80	8,553.41	37,776.48	5,970.74	
1933	26	220,187.81	174,088.25	9,357.40	19,002.98		17,739.18
1934	34	439,060.98	158,505.03	50,446.96	1,479,858.48	1,249,749.49	

8. During 1934 the Devonian Oil Company made 34 different sales or dispositions of assets. There were disposals of assets in every month of that year except June and August. Among these 34 transactions was the sale of the Alford lease, the Ingram lease, and the Milstead lease, hereinafter referred to as the "three leases." The receipts from sales of the 34 transactions amounted to $1,479,858.48, and of this amount $1,419,311.61 was received from the sale of the three leases. The profit from the sale of the three leases was $1,270,998.57. Due to losses on some of the sales the profit from all the sales, including the sale of the three leases, was $1,249,749.49 (in plaintiff's Exhibit 1 this profit was adjusted by the Commissioner to $1,239,166.79).

9. In arriving at decedent's total tax liability of $35,031.45, the Commissioner of Internal Revenue determined that decedent's correct net income was $116,354.23, which amount included taxable dividends in the sum of $112,742.32; that plaintiff had a personal exemption of $2,500 and an earned income credit of $300; that the total tax liability was $35,-236.68; that there were credits against said tax of $172.43 representing tax paid at the source, and $32.80 as foreign tax paid; leaving a total amount of tax due exclusive of interest of $35,031.45.

10. During the year 1934 the Devonian Oil Company had outstanding in the hands of its stockholders 321,805 shares of stock at $10 per share; an additional 6,995 shares were held in the company's treasury, making a total of 328,800 shares. In that year the Company made five distributions to its stockholders, four of which were: 25 cents per share on January 20, April 20, July 20, and October 20, making a distribution on each of said dates of $80,451.25.

On April 1, 1934, the Devonian Oil Company sold the three leases, received payment on May 15, 1934, and on June 11, 1934, made a distribution to its stockholders of $5 per share, or a total of $1,009,025.00. None of the five distributions or dividends to its stockholders in 1934 were liquidating dividends in the sense that capital stock was called in and canceled. The Devonian Oil Company would not have had enough cash with which to make the distribution of

$1,609,025 to its stockholders on June 11, 1934, without the money received from the sale of the three leases on April 1, 1934.

11. In determining the amount of earnings and profits available for dividend payments to be distributed to stockholders from 1920 to 1933, inclusive, the Commissioner of Internal Revenue averaged the Devonian Oil Company's total income from all sources for each particular year and treated the dividends as paid from earnings or as representing returns from capital on the basis of an annual ratable accrual of income. The four dividends of 25 cents per share distributed in 1934 were treated the same way. The dividend of $5 per share paid on June 11, 1934, was chiefly paid out of cash received from the sale of the three leases, and the Commissioner allocated the cash from the sale of the three leases to the payment of this dividend and did not prorate it over the year's earnings or returns of capital.

12. The defendant adheres to the computation made by the Commissioner of Internal Revenue in his letter of January 20, 1938, plaintiffs' Exhibit 1, which, beginning on top of page 13 thereof, is as follows:

Total income for 1934		$1, 432, 333. 54
Net profits realized from sale capital assets as reported in corporation return	$1, 249, 749. 49	
Deduct excess cost depletion erroneously charged to reserves to December 31, 1933, Depletion account by taxpayer, Schedule "B" of return	10, 582. 70	
		1, 239, 166. 79
Earnings of year 1934 or 365 days		193, 166. 75
Earnings available one day $529.223973.		
Earnings from October 20, 1933, through December 31, 1933		44, 806. 77
Earnings from January 1, 1934, to January 20, 1934, or: 19 days×$529.223973		10, 055. 26
		54, 862. 03
Deduct distribution made January 20, 1934		80, 451. 25
Amount paid from other than earnings		25, 589. 22

Earnings from January 20, 1934, to April 20, 1934, or 90 days×$529.223973	47, 630. 16
Applied to distribution made April 30, 1934	80, 451. 25
Amount paid from other than earnings	32, 821. 09
Earnings from April 20, 1934, to June 11, 1934, or 52 days×$529.223973	27, 519. 65
Profit realized from sale of capital assets as previously shown in this letter	1, 239, 166. 79
Earnings available June 11, 1934	1, 266, 686. 44
Distribution made June 11, 1934	1, 609, 025. 00
Amount paid from other than earnings	342, 338. 56
Earnings from June 11, 1934, to July 20, 1934, or 39 days ×$529.223973	20, 639. 73
Deduct distribution made July 20, 1934	80, 451. 25
Amount paid from other than earnings	59, 811. 52
Earnings from July 20, 1934, to October 20, 1934, or 92 days×$529.223973	48, 688. 60
Deduct distribution made October 20, 1934	80, 451. 25
Amount paid from other than earnings	31, 762. 65
Balance of unused earnings October 20, 1934, to December 31, 1934, or 73 days×$529.223973	38, 633. 35

RECAPITULATION

Date of distribution in 1934	Amount distributed	Amount from earnings	Percent taxable	From other than earnings	Percent non-taxable
January 20	$80, 451. 25	$54, 862. 03	68. 1929	$25, 589. 22	31. 8071
April 20	80, 451. 25	47, 630. 16	59. 2038	32, 821. 09	40. 7962
June 11	1, 609, 025. 00	1, 266, 686. 44	78. 7239	342, 338. 56	21. 2761
July 20	80, 451. 25	20, 639. 73	25. 6550	59, 811. 52	74. 3450
October 20	80, 451. 25	48, 688. 60	60. 5194	31, 762. 65	39. 4806
	1, 930, 830. 00	1, 438, 506. 96	74. 5020	492, 323. 04	25. 4980

13. Plaintiffs' computation which begins with the same income for 1934 as appears on top of page 13 of plaintiffs' Exhibit 1, but by prorating the profit realized from sale of capital assets over the entire year the same as the Commissioner did with other earnings as the basis for arriving at the eanings of one day, is as follows:

Earnings for 1934	$193, 166. 75
Profit realized from sale of capital assets	1, 239, 166. 79
Total income for 1934	1, 432, 333. 54
Earnings for 1 day ($1,432,333.54÷365)	3, 924.20

14. Decedent's ownership of stock in the Devonian Oil Company in 1934 and the distributions received by him were as follows:

Date	Shares owned	Distribution received
January 20	20, 430	$5, 107. 50
April 20	20, 430	5, 107. 50
June 11	20, 780	103, 900. 00
July 20	20, 780	5, 195. 00
October 20	20, 780	5, 195. 00
Total		124, 505. 00

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

The sole question in this case is what part of a dividend received by Harry Heasley in the year 1934 from the Devonian Oil Company is taxable and what part is not taxable.

During the years 1920 to 1934, inclusive, the Devonian Oil Company was engaged in the buying and selling of oil and gas leases and in the production and sale of crude oil. Between the years 1925 and 1934 it disposed of a great many of its capital assets. There were gains and losses in the sales of the various properties. The total operations showed a net gain for some years and a net loss for others.

The issue in this case grows out of a transaction during the year 1934, the taxes for that year being paid in the year 1935, with additional special assessments for 1934 paid in 1936 and 1937.

During the year 1934 the Company made 34 different sales of assets. Sales were made in every month of the year except June and August. Among the 34 transactions was the sale of the Alford, Ingram and Milstead leases, which will be referred to as the three leases. Total sales for the year amounted to $1,479,858.48. Of this amount $1,419,311.61 was received from the sale of the three leases. The profit from

the sale of the three leases was $1,270,998.57. Due to losses on some of the sales the profit from all the sales during 1934, including the sale of the three leases, was $1,249,749.49.

During 1934 the Company paid four regular quarterly dividends of 25 cents per share, thus making a distribution of $80,451.25.

On April 1, 1934, the Company sold the three leases, receiving payment May 15, 1934. On June 11, 1934, it made distribution to its stockholders of $5.00 per share, or a total of $1,609,025.

On June 11, 1934, Harry Heasley owned 20,780 shares out of a total of 321,805 outstanding in the hands of stockholders. He received dividends thereon in the total amount of $124,505 during 1934.

In arriving at the amount of earnings available for dividend payments in each of the years 1920 to 1933, inclusive, the Commissioner of Internal Revenue averaged the Devonian Oil Company's total income from all sources for the year, treating the income as accruing ratably throughout the year. For the year 1934 he used the same method as to the four regular quarterly dividends, but applied a different method for determining the operating income for the profit from the sale of the three leases. The profits from the sale of these three leases he did not treat as having accrued ratably.

The defendant contends that the profits from the sale of the major capital asset need not be prorated over the year as ordinary income, but as profits available for a special dividend distribution.

In the light of the peculiar facts of this case, we do not think that the Commissioner of Internal Revenue was justified in departing from the method which he had used during the previous years. During the previous years as well as during the year 1934 there had been numerous sales of leases and other assets. Some of these showed gains, some of them showed losses. It was practically impossible to tell until the end of the year whether there would be a gain or a loss for the year. In treating this particular transaction separately and in arriving at his determination the Commissioner of Internal Revenue did not take into consider-

ation overhead and other operating costs. He did not take into consideration either depreciation or depletion for the year 1934, though these had been taken into account in previous years.

True, this was a large transaction and undoubtedly showed a profit, but with all these factors present, we do not see how the Commissioner could know just what that profit would be until the end of the year when the various factors and the amount involved in such factors could be known and until the further losses and profits for the year had been ascertained. In the sale of numerous assets in the oil business it is always possible that profits will be almost if not completely absorbed by other losses during the operating year.

Practically the same question was considered by the Board of Tax Appeals in the case of *Gardner Governor Co.* v. *Commissioner*, 5 B. T. A. 70, except in that case the position of the parties was reversed, the Government contending for and securing a decision to the effect that the losses should be prorated through the year in order to determine whether there was a net gain or a loss. The Board in that case commented upon the endless confusion and disputes that would arise if an arbitrary method were to be used as to isolated transactions. In a memorandum opinion by the Board of Tax Appeals entered November 6, 1941, in *Boylston Market Association C. C. H.* (1941, par. 7769–B), it was held that a method used consistently over a period of years should be continued.

The Government having taken one position in the *Gardner* case, *supra*, and having prevailed, it does not seem just that it should now be permitted to take a directly opposite position and prevail again merely because it would mean more money in the individual case, especially in view of the confused consequences that would necessarily follow. We do not think the cases of *Mason* v. *Routzahn*, 275 U. S. 175 or *Edwards* v. *Douglas*, 269 U. S. 204, applicable to the facts of this case. Entirely different questions were presented in those cases.

In the instant case the special dividend distribution was considerably more than the profits from the sale of the three

leases and considerably more than the total profits from the entire year. In the many sales that were being made involving both profits and losses, it was impossible to determine at the time of the special distribution or at the time of the sale of the property or at any period during the operating year just what the profits, if any, would be during that year. If a separate method is to be used in reference to a transaction simply because it is large, then there is no logical dividing line and there would be no sure method by which the taxpayer could know in advance into just what classification any individual item would fall. Numerous lawsuits and consequent uncertainty would inevitably result.

In the facts of this case the taxpayer was entitled to the usual method of prorating the profits over the year and to have the tax levied on the basis of the net earnings for the year in accordance with the method used by the Commissioner of Internal Revenue in calculating the tax of the same company for the previous several years.

Plaintiffs are entitled to recover the sum of $18,525.92, with interest thereon at the rate of 6 percent per annum from March 24, 1937.

It is so ordered.

Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

Madden, *Judge*, dissenting.

The question is whether a $1,239,166.79 profit received on May 15, 1934, by Devonian Oil Company from the sale of three leases, and distributed to its stockholders in a special dividend on June 11, 1934, should be treated as having been earned by Devonian before, or after, June 11. The mere statement of the question would seem to answer it. It was in fact earned and received on May 15.

Plaintiff argues that we should treat the profit as if it had been received a little at a time throughout the entire year 1934, one three hundred and sixty-fifths of it on each day. The effect of our indulging in this fiction would be to make more than half of this sum nontaxable to the stock-

holders, including plaintiff, who received the profit by way of a special dividend, since, upon our assumption, we would have to regard more than half of the distribution of this profit as a distribution of capital.

The statutes are plain. Dividends paid to a stockholder constitute income in his hands for income tax purposes, if they are paid out of earnings or profits of the corporation and not out of its capital. The Revenue Act of 1934, c. 277, Sec. 115, 48 Stat. 680, provides as follows:

> (b) Source of distributions. For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. * * *

By this statute the Commissioner of Internal Revenue was, I think, required to treat this distribution on June 11 as having been made from the May 15 profit.

Plaintiff urges that because the Commissioner had, in other years, and in 1934, apportioned the Devonian Company's ordinary profits over its fiscal year in determining what proportion of its regular quarterly dividends came from income and not from capital, he must do the same with this special distribution of an extraordinary profit. The process of apportioning the earnings over the year is in the ordinary case a convenience to the corporation, the taxpayer-stockholder, and the Government. It saves the corporation the expense and trouble of making accountings at the several times in the year at which it pays its dividends, and permits it instead to have one accounting to show how its affairs stood for the entire year. It saves the Government the expense and trouble of checking and verifying four accounts per year instead of one. Hence the practice seems to have been put into effect by the Commissioner by common consent and in the interest of efficient administration.

The practice of apportionment would have served no purpose of convenience in the case before us. Both the profit and the distribution were so extraordinary, in comparison with the regular business of the Devonian Company, that a single look at the books shows where the money that was distributed came from, and when.

In *Edwards* v. *Douglas*, 269 U. S. 204, the Supreme Court of the United States approved the practice of apportionment, when there was no showing that the practice operated to the prejudice of the taxpayer. In *Mason* v. *Routzahn*, 275 U. S. 175, that Court refused to sanction apportionment when its effect was to impose the higher tax rates of a later year upon income that had in fact been earned before that year. I think we should not require the Commissioner to use apportionment when it is demonstrable that it deprives the Government of revenue due it under the plain terms of the statute. I would dismiss plaintiff's petition.

CARIBBEAN ENGINEERING CO. v. THE UNITED STATES

[No. 44691. Decided October 5, 1942]

On the Proofs

Government contract; decisions of contracting officer, finality of.—In contract for construction of houses in Puerto Rico housing development, the decision of the contracting officer, if made in good faith, was final and conclusive on whether or not articles furnished were "similar or equal to" those specified. If arbitrary or unreasonable, his decision is subject to review by the court.

Same; closet bends.—Whether or not closet bends furnished were "equal or similar to" those specified, reviewed.

Same; delays caused by defendant, damages for; extensions of time granted on account of delays caused by defendant; unforeseeable causes.—Mere fact that defendant granted extensions of time for delays caused by it does not entitle plaintiff to recover damages for the delay; plaintiff must show further that delay was unreasonable. *Griffiths* v. *United States*, 74 C. Cls. 245; *B-W Construction Co.* v. *United States*, No. 43925, decided October 5, 1942. *Ante*, p. 92.

Same.—Bad weather was not an "unforseeable cause," under terms of the contract in suit.

The Reporter's statement of the case:

Mr. Harry D. Ruddiman for the plaintiff. *King & King* and *Mr. John W. Gaskins* were on the briefs.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Rawlings Ragland* was on the brief.

The court made special findings of fact as follows:

1. The plaintiff, Caribbean Engineering Company, is a corporation organized and existing under the laws of Puerto Rico, with its principal place of business in San Juan, Puerto Rico.

2. On December 8, 1936 the plaintiff entered into a contract with the Administrator of the Puerto Rico Reconstruction Administration acting for and on behalf of the United States of America, whereby plaintiff, for a consideration of $210,700, agreed to construct seventy-six duplex, reenforced concrete houses at the Eleanor Roosevelt Development at Hato Rey, Río Piedras, Puerto Rico. Plaintiff agreed to furnish all plant, labor and materials, and perform all work required for the completion of the houses in conformity with the provisions of the advertisement, invitation for bids, bid, instructions to bidder, construction regulations, labor regulations, specifications, plans and bond.

3. Paragraph 16, article 8, of the construction regulations of the contract reads as follows:

> If the Contractor considers that any work which the Administration Inspector informs him must be done is not required by the Contract; or that any record, instruction, or ruling of the Administration Inspector is unfair; or if any other dispute concerning a question of fact arises in connection with the performance of the Contract, the Contractor may request in writing and the Administration Inspector shall furnish a written record, instruction, ruling, or decision relating to the matter at issue. Within five (5) days after the receipt of such written instruction, record, ruling, or decision, the Contractor may file a written protest with the Administrator. The Administrator will give due consideration to such protest, and will decide the matter at issue. Pending such decision, the Contractor shall diligently proceed with the work required by the Contract as directed by the Administrator.
>
> Except as is provided in Paragraph 9 of the Labor Regulations, the decision of the Administrator upon all disputes arising under this Contract shall be final and binding upon the parties.

Paragraph 24, Article 11, of the construction regulations of the contract provides as follows:

> ARTICLE 11. COMMENCEMENT, PROSECUTION, AND COMPLETION OF PROJECT.
>
> (Par. 24)—The Contractor shall commence work upon the project within ten (10) calendar days after the date of receipt by him of notice to proceed, and shall continue to work upon the project with sufficient plant, personnel, material, equipment, and appliances in such manner and at such rate that the project can be completed within the time specified in the Contract. The work upon the project is to be carried on in such order of precedence as the Administrator may determine. The time for the execution and completion of the work shall be two hundred and ten (210) calendar days. In case of failure on the part of the Contractor to complete the project within the aforesaid time, the Contractor shall pay to the Administrator as liquidated damages the sum of TWO HUNDRED dollars ($200.00) for each calendar day of delay, until the project is completed and provisionally accepted. The Administrator in his discretion may allow extension of time with waiver of liquidated damages for delays due to any of the causes stated in Paragraph 32 of these Construction Regulations, and the decision of the Administrator as to whether the delay is due to any of such causes shall be final and conclusive.

Paragraph 32 of the construction regulations provides as follows:

> (Par. 32)—An extension of time equal to the time lost by delay shall be allowed to the Contractor for the completion of the project, if, during the progress of the project,
>
> (a) the Administrator should find it necessary to stop the work thereon for any period of time not exceeding three (3) months; or
>
> (b) the work should be delayed on account of unforeseen causes beyond the control and not due to any fault or negligence of the Contractor, including, but not restricted to, Acts of God, acts of the public enemy, acts of the Administrator, acts of another contractor in the performance of a contract with the Administrator, fire, floods, epidemics, quarantine restrictions, strikes, or freight embargoes: *Provided*, that the Contractor shall, within forty-eight (48) hours from the beginning of the cause of such delay submit to the Administrator written

notice of such delay and proof satisfactory to the Administrator as to the impossibility of prosecuting the work for any of the above causes.

Any extension of time under this Article shall in no way modify the obligations of the Contractor under the Contract, and the Contract shall continue in full force and effect as if the date set for the completion of the project after the grant of such extension of time had originally been stipulated in the Contract.

4. The notice to proceed was received on December 12, 1936, thereby fixing the contract completion date as July 10, 1937. The work was completed on November 24, 1937, one hundred thirty-seven days after the original contract completion date.

Extensions of time totalling seventy-one days were granted by defendant to the plaintiff, as follows:

	Days
Because of unforeseeable weather conditions	32
Because of suspension of work on certain holidays pursuant to instructions of the Administration inspector	2
Because of delay resulting from issuance and revocation of change order No. 3	2
Because of delay of the Government in passing upon plaintiff's appeal from a decision of the Chief, Slum Clearance Section, Puerto Rico Reconstruction Administration	35

The decision referred to in the last item relates to the use of a plumbing fixture known as a closet bend. The controversy regarding the closet bends is the basic issue in the present case.

Since seventy-one days' extension of time was granted, liquidated damages at $200 a day were assessed for sixty-six days in the sum of $13,200.

5. The reenforced concrete houses called for by the contract and constructed by plaintiff were one story in height. The foundation walls rested on concrete footings and earth was backfilled to the top of the foundation walls. The floor was a reenforced concrete slab resting on the earth backfill. The exterior walls were of concrete 4'' thick and the interior walls were of concrete 3'' thick and rested upon a concrete floor slab. The roof was also of reenforced concrete, being supported by both the exterior and interior walls. The plumbing was installed in trenches underneath the floor slab.

The specifications with reference to the plumbing designated that—

> The entire system of soil, waste, drain, and vent piping including the drainage system must be tested with water, as hereinafter described, and proved tight to the satisfaction of the Chief, Slum Clearance Division, before the trenches are backfilled, piping covered, or fixtures connected.

The normal sequence of building operations to be followed after construction of the foundation walls and footings comprised installation of the soil, waste, drain, and vent piping, this to be followed by the pouring of the floor slab. The exterior and interior walls were then to be erected, the interior walls and partitions being supported by the floor slab. Finally the roof slab was to be poured. As this was partially supported by the interior walls it could not be poured until the interior walls were in place.

6. Plaintiff's concrete plant consisted of concrete mixers, three towers equipped with cylindrical adjustable chutes, and eleven duplicate sets of forms. Plaintiff's intended operation with respect to the concrete was to carry on more or less simultaneous construction on a group of houses by erecting the concrete pouring towers at the proper locations, mixing the concrete and hoisting the same to the top of the towers, and then distributing it by the adjustable chutes directly into the forms.

Plaintiff planned to pour both the exterior and interior walls of a house at the same time in 4-foot sections, the interior forms and exterior forms mutually cooperating in bracing each other. After the exterior and interior walls had been completed the roof slab was to be poured, thus completing the cement work and releasing the cement equipment for use at another location. After the concrete work was completed, the balance of the work, such as cement finishing, painting, installing doors, windows, hardware and sanitary fixtures, was to be done.

Plaintiff's intended methods and sequence of operation were in accordance with good engineering practice and represented an economical and expeditious method of doing the

work under the contract, and included the proper intervals of time between the pours.

7. A closet bend is a piece of cast-iron pipe, usually 4″ in diameter, comprising a 90° elbow, one end being about 18″ long and the other about 7″ or 8″ long. It is used to connect the outlet of a water closet to the soil pipe or waste line and its installation for this purpose requires that the long end of the elbow be connected with the soil pipe, with the short end of the elbow located so as to extend vertically through the concrete floor slab and be imbedded therein in a proper position to receive the discharge from the water closet.

In customary plumbing practice the soil or waste line is laid from the outside sewer connection toward the plumbing fittings so that the closet bend may be regarded as the final element in the soil line to be connected and fitted in place.

The connection of the upwardly extending end of the closet bend with the water closet must of necessity be both water-tight and gas-tight, and in order to accomplish such a connection two accessories are inherently associated with the closet bend. The first is a flange adapted to be mounted in fixed relationship on the vertical portion of the closet bend, the flange being adapted to receive bolts by means of which the water closet is attached thereto. As the water closet also rests on the bathroom floor and is bolted thereto, the various vertical relationships between the floor surface, the upper flange surface, and the depending horn or discharge orifice of the water closet, must all be accurately established.

The flanges are made either of cast iron or of brass. Brass is more expensive, but when used danger of rust stains on the floor adjacent the toilet is eliminated in case of accidental leakage at the flange.

The second device is a seal of some kind between the depending horn of the water closet and the flange or upper end of the closet bend. This seal may comprise a compressible gasket of various materials, such as rubber or treated asbestos fabric, or may be formed of plastic material which is adapted to harden after being placed in position.

8. For the purpose of the present case closet bends may be divided into two classes, depending upon the method of

mounting or fixing the flange to the vertical end of the installed closet bend, and these will be hereinafter referred to as the slip-over type and the screw type.

9. The following steps exemplify the installation of a closet bend of the slip type and its associated flange:

The bend is first set in proper position with its long end connected to the waste line by a bell and spigot joint packed with oakum and lead, and with its short end vertical and approximately flush with or slightly above the future final floor level. After all the soil and waste lines have been installed the open end of the upwardly projecting portion of the bend is temporarily closed by an expansible rubber plug and a water test applied by filling the entire waste and sewer system with water for a predetermined period of time in order to detect any possible leaks. After the test the rubber plug is removed and is replaced by a piece of burlap sacking or equivalent material or wooden plug to prevent concrete or other débris from entering the closet bend and soil pipe. The concrete floor slab is then poured.

After the final floor surface has been laid on the floor slab, and just prior to the installation of the water closet, the slip flange is placed in position and fixed to the upper end of the closet bend. The slip flange comprises a circular flat plate having a horizontal upper surface provided with bolt holes or openings through which the water closet bolts may pass, and a downwardly extending tapered portion or collar several inches in depth, this latter portion when slipped over the vertical end of the closet bend forming an annular tapered channel which receives a packing of oakum in its lower portion, melted lead being poured into the upper portion of this annular recess, the lead being subsequently caulked.

Prior to installing the flange on the upper end of the bend it is necessary to cut away the concrete around the closet bend to the proper diameter and depth so that the flange may be set in its proper vertical relationship to the vertical end of the closet bend, and with its horizontal upper surface slightly above the floor level. Prior to fixing the flange in position the top end of the closet bend must be nearly always cut off in proper relationship to the finished floor.

After the flange has been properly located and caulked with the oakum and lead, the gasket or equivalent sealing means is inserted and the water closet bolted both to the flange and to the floor. The lead does not amalgamate with the iron closet bend, and the joint between the flange and the bend is therefore classifiable as one dependent upon friction.

10. The closet bend of the screw type has its vertical or short end threaded, and the associated coupling flange is necessarily provided with a corresponding thread upon the interior part of its dependent portion. In this type, therefore, instead of holding the flange in its proper relationship to the closet bend by means of a caulked lead joint, the flange is screwed down on the vertical portion of the closet bend to its proper elevation. The standard threads on the 4″ bends have a pitch of ⅛ inch so that one-quarter of a revolution of the flange on the bend gives an adjustment of $\frac{1}{32}$ of an inch. This method of attachment thereby contributes to an accurate adjustment in the relationship of the flange to the floor.

A more detailed description of the various steps in the installation of a closet bend of the screw type is given in subsequent Finding 12, with particular reference to a bend known as the Josam type "D" bend.

11. The specifications forming a part of the contract and under the heading "Plumbing" read in part as follows:

> 75. SCOPE OF WORK:
>
> Under this heading the contractor shall furnish and install the complete plumbing installation and water-supply system, including all fixtures, all cast-iron pipe and fittings, all galvanized wrought-iron pipe and fittings, all standard galvanized steel pipe and fittings, as shown on the plans or otherwise required, or that may not be specifically included in any other section. All must be in strict accordance with the Specification requirements, and in each case the best quality and grade of their respective kinds. The Contractor shall submit the name of the brand or maker of all plumbing materials and fixtures together with samples of each for the approval of the Chief, Slum Clearance Division, before any of the said materials or fixtures are delivered on the site of the job.

83. CLOSET BENDS:

All cast-iron closet bends shall be four (4) inches in diameter, similar or equal to type "D. Josam," as manufactured by the Josam Mfg. Co., Michigan City, Indiana, U. S. A., Catalog G, page 59.

Page 59 of Josam Catalog G illustrates at the top thereof a closet bend having the vertical or short portion thereof provided with a thread. Just below the middle of this page, which shows several different types of closet fittings, is illustrated a brass-threaded floor flange. This flange has a horizontal annular portion provided with four arcuate slots to receive the water-closet bolts, and a dependent portion, the interior of which is threaded for the purpose of screwing onto the threaded portion of the bend. This flange is intended to be used with the type "D" Josam bend in the completed installation.

This page contains at its top and in connection with the illustrations given thereon the following legend:

"Specifications and Prices on opposite page"

The descriptive matter to which the reader of this catalog is thus referred, and which amplifies the disclosure on page 59, is as follows:

Josam Combination Closet Fittings and Bends provide cast closed end for testing and safety, a long 4″ standard I. P. thread for adjusting flange to floor level and a slip hub for vent. They are made of cast iron equal to extra heavy soil pipe fittings in thickness and size and are black japanned. The cast closed end for testing may be easily cut off at floor level with hammer and cold chisel or with special Josam cutter. The long 4″ standard I. P. thread permits adjusting threaded brass flange to floor level. * * * The cast closed end for testing avoids the necessity of using test plug. * * *

Special Josam cast brass floor flange has slots and threaded holes for either head or thread of closet bolt. Floor flange may be purchased separately or with Josam Combination Closet Fittings at $1.00 extra list each. No bolts are furnished with flanges.

* * * * *

Round asbestos graphited gasket furnished with floor flange at 25 cents each, list.

* * * * *

> Each fitting is shipped with a substantial corrugated paper sleeve protecting the threads to insure their perfect condition on arrival. This sleeve also prevents cement and other matter from filling threads and at the same time provides a space in construction into which the threaded section of the flange easily screws.

Page 58 also contains adjacent the matter just quoted a half-tone sectionalized illustration showing a floor flange applied to the threaded portion of a closet fitting. The floor flange shown in this illustration indicates that its inner edge is beveled for the reception of the round asbestos gasket.

12. The following procedural steps relate to the installation of the type "D" Josam bend referred to in the previous finding. As in the case of the slip joint type of bend (see Finding 9) the bend is first set in proper position with its long end connected to the waste line by a bell and spigot joint packed with oakum and lead. Its short end is set vertically and in a position to project somewhat above the future final floor level. Due to the fact that the Josam type "D" bend is cast with an integral test cap which seals its upper end, the use of an expansible rubber plug to close the end of the bend, as is the case with the open-ended bend, is not necessary, and the water test of the plumbing system can thus be applied without the necessity of temporarily sealing the open end of the closet bend.

The integral test cap also functions as an absolutely reliable means for preventing building débris, liquid cement, or the like from getting into the sewer system during the interval between the installation of the plumbing and the completion of the building, and thus replaces the use of a temporary stopper of burlap sacking or equivalent material, which is customarily used for this purpose in an open-ended bend. At the time of installation, the bend is installed with a corrugated paper sleeve in place around the vertical projecting portion of the bend. This corrugated sleeve protects the threads and at the same time provides an annular space between the concrete floor and the vertical portion of the pipe in which the threaded section of the flange may be subsequently screwed.

After the final floor surface has been laid on the floor slab and just prior to the installation of the water closet the upwardly projecting portion of the closet bend is cut off approximately at the floor level by means of a hacksaw or other equivalent cutting tool, this operation removing the combined test or sealing cap. The interiorly threaded flange is then screwed down in position on the threads of the vertical projecting portion of the closet bend, this operation crushing down the corrugated paper sleeve. No chipping of the concrete or cutting of an annular groove in the concrete is therefore necessary. When the flange is screwed down to the proper position it is anchored or locked against rotation by means of one or more expansion bolts inserted through the flange into the concrete floor. The round gasket is then placed in the recess or bevel, and, the water closet retaining bolts having been previously inserted through the flange, the closet is bolted into position, both to the flange and the bathroom floor.

13. While it would be possible to install a slip-joint type of flange in conjunction with a threaded bend by caulking the flange in place with lead and oakum, such installation would be of a hybrid nature, and the threads would not possess their customary utility. It would be obvious to those skilled in the plumbing trade that the Josam type "D" bend illustrated on page 59 of the Josam Catalog G is threaded for the specific purpose of receiving the Josam threaded brass flange also shown on that page, and more completely illustrated and described on the opposite page (58), reference to which is made on page 59.

The Josam type "D" bend, as shown in Catalog G, was not patented.

14. In the building trades the phrase "similar or equal to" as applied to articles of manufacture relates to—

(a) Installation;
(b) Function;
(c) Life expectancy.

(a) In comparing the Josam type "D" bend with the conventional slip-joint type bend with respect to installa-

tion, the "roughing in" or initial step in the installation of both types of bend is identical, in that the short end is located vertically by means of a level prior to the pouring of the floor slab.

In the subsequent operations the Josam bend is easier to install than the slip-joint bend. Screwing on the associated flange to the proper adjustment requires a lesser degree of skill than the packing and caulking of the flange in the latter type. Caulking requires, first, the insertion of the proper amount of oakum and, second, the heating of the lead to the proper molten consistency. When the lead has cooled and solidified, the caulking, which must be done with a caulking tool and hammer, must be sufficient to make a tight friction joint between the flange and the vertical end of the bend, and at the same time caution must be used in the caulking operation not to drive the flange downwardly on the vertical end of the pipe, thereby spoiling the predetermined adjustment of the upper surface of the flange with respect to the floor level.

In the slip-joint type of bend, during the period of building operation and until the water closet is placed, care must be exercised in the placement of the burlap or equivalent packing for the open end of the closet bend to prevent débris from building operations from entering the sewer line. This is especially true where concrete pouring operations are involved and there is a likelihood of concrete water or liquid concrete flowing into the open end of the bend and lodging some place in the sewer line.

The integral test and sealing cap of the Josam type "D" bend is a positive safeguard against débris and concrete entering the sewer line through the closet bends.

(b) As regards functional equality, the Josam type "D" bend and the slip-joint bend will function equally well, provided they have been properly installed and no obstructions have entered the bends.

(c) As regards life expectancy, these types of bends will be similar, so far as rusting or breaking is concerned, provided they are made of a satisfactory or suitable material. In the use of a water closet it is subjected to sidewise strains, which are transmitted by the bolts to the flange. Such

strains may over a period of time have the effect of loosening the lead joint, thus permitting the flange to slip and thereby causing a leak at this point. In contradistinction to this, the screw flange of the Josam type "D" bend as installed has at all times positive fixed relationship with the screw-threaded vertical end of the bend.

15. Paragraph 76 of the technical specifications provided:

> All work done under this contract shall conform in every respect to the rules and regulations of the Department of Health of Puerto Rico * * *.

The regulations of the Health Department of Puerto Rico, as interpreted by the health authorities, permitted the installation and use of a closet bend having the slip joint type of flange with the lead and oakum connection and also the Josam type "D" bend with the threaded flange connection, and a number of this latter type had been installed and were in use in Puerto Rico prior to the present controversy.

16. The Josam type "D" bend, as illustrated and described on pages 58 and 59 of the 1928 catalog G, had been replaced to some extent by a later model, described and illustrated on page 97 of the 1935 catalog H of the Josam Manufacturing Company. This catalog shows a locking ring on an internally threaded bend.

The Josam Manufacturing Company, whose plant was located at Michigan City, Indiana, had the original type "D" Josam bend, complete with flange and gasket, in stock in 1936, and had the necessary equipment to manufacture and ship on order a minimum of 25 Josam type "D" bends a day if none were in stock.

The Josam Manufacturing Company had a local representative in Puerto Rico, Mr. Ulpiano Casal, and original Josam type "D" bends ordered by him by air mail on June 8, 1937 were shipped from Michigan City on June 15, 1937.

17. Plaintiff attempted to obtain from a local dealer in plumbing supplies in San Juan, Puerto Rico, Mayol & Company, the type "D" Josam bends illustrated in the 1928 catalog G, but was erroneously informed that the manufacture of the type "D" bend had been discontinued and that in place of it there was available the type "D" bend illustrated in the 1935 Josam catalog. Plaintiff was also

informed that it could obtain no guarantee as to the time when the bend illustrated in catalog G might be delivered.

On December 4, 1936 plaintiff ordered through Rafael Rodriguez Barril, of San Juan, Puerto Rico, certain plumbing materials and plumbing fixtures. The order included 160 closet bends and flanges manufactured by Hedges-Walsh-Weidner Company, a firm located in Chattanooga, Tennessee. The bends were of the same dimensions as the type "D" Josam bend appearing in the 1928 catalog G.

18. On December 14, 1936 the Chief, Slum Clearance Section, notified plaintiff by letter that, pursuant to Section 15 of the Technical Specifications, it should submit to the former's office and forward in two shipments samples of plumbing material and plumbing fixtures. On the same date plaintiff was notified by letter to furnish with each shipment of material the certificate specified in Section 16 of the Technical Specifications. On January 14, 1937 plaintiff's attention was again called to the requirement of Section 15 and plaintiff was informed that "no material will be accepted unless this condition be satisfied."

On January 20, 1937 the plaintiff sent to Manuel Egozcue, Chief of the Slum Clearance Section, Puerto Rico Reconstruction Administration, and representative of the contracting officer, the shipping documents for the closet bends and connections shipped by Hedges-Walsh-Weidner Company. Sometime in February plaintiff also furnished to Mr. Egozcue a certificate of material specified in Section 16 of the Technical Specifications. This certificate was executed under date of February 4, 1937.

On February 17, 1937 the shipment of closet bends and flanges arrived in Puerto Rico. The closet bends were of the nonthreaded type and did not have a sealing or testing cap, and the flanges were of the slip joint type, constructed of cast iron and adapted to be fastened to the closet bend by means of a lead and oakum joint.

Sometime between receipt of the shipment and March 1, 1937, samples of the bends and flanges were inspected by defendant's representatives, and as the result thereof Egozcue by a letter dated March 1, 1937 rejected plaintiff's closet bend and flange.

Subsequent metallurgical tests made at the United States Bureau of Standards showed that as far as the quality and thickness of the metal of the cast iron bends and their functional equality were concerned, the Hedges-Walsh-Weidner bend was similar and equal to the Josam bend.

Insofar as ease, accuracy and safety of installation, and life expectancy are concerned (see Finding 14), the Hedges-Walsh-Weidner bend and its associated flange were not similar nor equal to the Josam type "D" bend and its intended associated flange, and the rejection contained in the letter of March 1, 1937 was not arbitrary nor unreasonable.

19. Under date of March 1, 1937 plaintiff wrote to Mr. Miles H. Fairbank, Acting Administrator, requesting an extension of time for completion of the contract. A translation of this letter is as follows:

> In accordance with a letter of this same date that we have received from Mr. Manuel Egozcue, Chief Slum Clearance Section, under which section we are performing the above referred contract for the construction of 76 Workmen's Houses, at Eleanor Roosevelt Development, Hato Rey, Rio Piedras, P. R., we have been rejected the following material:
>
> 1. One half inch (½″) lock gas stops.
> 2. Closet bends.
> 3. Special slothed [slotted] collars for closet bends.
> 4. Trap screw ferrules and plugs.
>
> Said material was ordered from the United States in accordance with what is required by our contract, that is to say similar to those taken as a model. Nevertheless, the Engineers inspector of that Administration have decided to reject this material, which brings as a consequence the stop of the work, as we are not permitted to install same.
>
> As this stop injures the progress of the contract, affecting its completion within the time stipulated, and as we are not responsible of same, we take the liberty of applying to you for an extension of said time for completion in accordance with what is stated in "Article 16—DELAYS" of the "CONSTRUCTION REGULATIONS" of our contract above referred, that says:
>
> "Article 16—DELAYS:
>
> (Par. 32) An extension of time equal to the time lost by delay shall be allowed to the Contractor

for the completion of the project, if, during the progress of the project;

(b) the work should be delayed on account of unforeseen causes beyond the control and not due to any fault or negligence of the Contractor------ ------------------ *Provided*, that the Contractor shall, within forty-eight (48) hours from the beginning of the cause of such delay submit to the Administrator written notice of such delay and proof satisfactory to the Administrator as to the impossibility of prosecuting the work for any of the above causes."

In this moment we are pouring the footings of the houses under our contract, which means that this is the moment of placing the material rejected, and if this material is not permitted to be placed, necessarily we will have to stop the work and wait, for which reason we respectfully require of you your prompt decision on our application for extension equal to the time that the work remain stopped for the reasons already mentioned.

20. Under date of March 3, 1937 plaintiff submitted in writing to Mr. Egozcue an alternative plan of plumbing installation which would eliminate the necessity of the use of closet bends in fifty-two of the seventy-six houses covered by the contract. This alternative plan provided for a change in the contract, in that it provided for a direct discharge from the closet bowl to the soil pipe. This letter enumerated certain advantages which would be obtained if the proposed change in the contract plans were accepted, and contained the statement that the manufacture of the Josam bend called for in the specifications had been discontinued.

21. On March 6, 1937 Mr. Egozcue replied in writing to plaintiff's request to change the contract, rejecting the alternative plan, this letter stating in part as follows:

* * * * *

After due consideration of your proposition, this office finds that the plumbing installation, as designed and specified and approved by the Department of Health of Puerto Rico, is one of the various satisfactory ways in which such work can be done; and there is no reason why we should change such design except that in so doing there would be eliminated certain fittings which

you purchased and delivered on the job in violation of Section 15 of the Technical Specifications * * * * * * but you will readily understand that we could not possibly change our plans and specifications to meet the conveniences of the several contractors whenever it so suits them to request it, specially when such changes tend only to legalize violations of our specifications and plans.

With reference to what you say about the manufacture of the Josam bend having being discontinued, we wish to inform you that we are aware of the fact that a change has been introduced in the manufacture of this bend as illustrated in the manufacturer's catalog "H," which is the latest edition; but nevertheless, the bend we specify can be secured without difficulty. Besides, if you should use the Josam type bend, we anticipate there would be no objection in accepting the latest type of bend manufactured by the Josam Mfg. Co., which, by the way, is being sold at a lower price than the design specified.

* * * * *

We may say for your information that the closet bends specified, Josam type, we understand are also manufactured by the firm of Blake Specialty Co., of Rock Island, Ill.

* * * * *

22. By letter of March 8, 1937 the plaintiff appealed to Mr. Miles H. Fairbank, the Acting Administrator. A translation of this letter is in part as follows:

We have a letter from Mr. Manuel Egozcue, Chief, Slum Clearance Section, who rejects a proposition of the undersigned with respect to the installation of certain material in the plumbing system for the houses object of our contract with that Administration, No. ER-PR-42, and as we are not satisfied with the decision of Mr. Egozcue above cited, we appeal to you in accordance with the provisions contained in "(Par. 9)—Errors, Discrepancies, Omissions.—," of Art. 4 of the "CONSTRUCTION REGULATIONS," and our appeal is based on the following grounds:

With respect to the closet bend of the plumbing system, the contract provides as follows:

"83. Closet Bends: All cast-iron closet bends shall be four (4) inches in diameter, similar or equal to type 'D Josam', as manufactured by the Josam Mfg. Co., Michigan City, Indiana, U. S. A., Catalog G, page 58."

The letter then cites numerous difficulties in obtaining Josam bends, after which it further states:

> Under these circumstances we decided to purchase the necessary materials pursuant to the specifications of the contract, similar to the Josam bend, with the object of its immediate obtention and installation.
>
> We sustain that the material purchased by us is similar to the Josam type because it serves exactly the same purpose and the same object, and its function is exactly the same, with equal or better efficiency.

The letter then continues with reference to plaintiff's proposed change in the contract which would eliminate the bends, and presents arguments with respect to the advantages of such a change.

23. On April 21, 1937, plaintiff was informed as follows with respect to its appeal:

> As per our letter to you of March 1st, 1937, the following materials which you proposed to use in Contract No. ER–PR–42, were rejected by this office:
>
> 1. One half inch (½″) lock gas stops.
> 2. Closet bends.
> 3. Special slothed [slotted] collars for closet bends.
> 4. Trap screw ferrules and plugs.
>
> On March 6, 1937, this office wrote you denying approval of changes suggested by you to the plumbing installation for the seventy-six (76) Duplex houses you are constructing.
>
> On the action taken by this office on the above matter, you appealed to the Administrator. Your appeal has been given careful consideration by the Administrator who had the matter submitted to several officers of the PRRA for advice.
>
> As the result of the investigation and study on this matter, we have been directed to inform you and we are hereby advising you that the Administration has decided to uphold this office's decision as expressed in our letters of March 1st and March 6th, 1937.

24. On April 22, 1937 the plaintiff submitted samples of a bend and associated flange, proffered as equal or similar to the type "D" Josam bend. The bend thus submitted was the same bend as ordered and shipped by the Hedges-Walsh-Weidner Company, but with threads cut on the short end by the plaintiff. The associated flange submitted with the bend

was a forged brass flange having interior threads to correspond with the threaded portion of the bend. On the following day plaintiff delivered to defendant a circular asbestos and graphite gasket of the same type used in the Josam bend.

Two days later, April 24, 1937, Mr. Egozcue, Chief of the Slum Clearance Section, rejected this offer, the letter reading as follows:

> You are hereby notified that the sample of Closet Bend submitted by you on April 22, 1937, has been rejected by this office because it does not comply with the specifications.

This rejection was further amplified by a second letter from Egozcue under date of May 5, as follows:

> Please be informed that sample of Cast Iron Closet Bend and Bronze Floor Flange submitted for approval on April 22, 1937, to be used in the work under Contract ER-PR-42, is hereby rejected for not complying with the Specification requirements. The following deficiencies have been noted in the sample submitted:
>
> 1. Since the C. I. bend was not originally intended for threading, the thread cut on the job naturally weakens the section of the pipe.
>
> 2. The sample has no locking ring to fix the floor flange at the required elevation.
>
> 3. There are no gaskets to make a watertight and gastight seal at the fixture outlet and at adjustable thread joint. Sealing with putty will not be permitted.
>
> 4. There is no test plate for sealing connection for test of plumbing system.

On May 12, 1937 the Chief of the Slum Clearance Section wrote the plaintiff and stated that in pursuance of its request he had given further consideration to the proposed bend and flange and found no reason for changing his views as expressed in his letter of May 5, 1937, and therefore could not accept the same. The plaintiff on May 18, 1937 appealed to the Administrator from the decision of Egozcue. On May 27, 1937 the Acting Administrator wrote the plaintiff sustaining the rejection, the pertinent portion of this letter being quoted:

* * * * *

> In looking into this matter, we find that the action taken by the Slum Clearance Office is correct since the fitting in question is not "equal or similar" to that given

as an illustration in the specification. By the works [words] "or similar" is meant that the outstanding characteristic features of the type given as an illustration, must be found in what is supplied. What you proposed to furnish does not comply with the above requirement and, therefore, cannot be accepted.

* * * * *

25. The bend submitted, and referred to in the previous finding, was substantially identical with the Josam type "D" bend with respect to its thickness of material, strength, metallurgical qualities and thread, but was not similar nor equal thereto, in that it did not possess the integral test and sealing cap, the advantageous functions of which have been previously enumerated, and also the brass floor flange submitted with this bend did not possess the locking means provided in the Josam flange and which comprised the beveled screw holes, by means of which the flange was anchored to the floor to prevent turning. This latter defect could have been easily remedied by boring holes in the flange with a portable power drill.

Item 1 in Egozcue's amplifying letter of May 5, *supra*, is meaningless, in that any pipe is weakened by the removal of metal necessary for threading, and the Josam bend and the submitted bend were similar in strength after threading.

Item 2 was incorrect in that it referred to a "locking ring" instead of a "locking means." The Josam bend had a locking means but this was not a locking ring in the technical meaning of such term.

The rejection of this submitted bend and its associated flange and the sustaining of such rejection, on the basic ground that the fittings were not "equal or similar" to those specified, were not arbitrary nor unreasonable.

26. Following receipt of the rejection of plaintiff's appeal on May 27, 1937, plaintiff's representatives conferred with the Administrator in an effort to secure approval of the closet bend. In his letter of May 12, Egozcue, Chief of the Slum Clearance Section, had made the following suggestion:

> After careful study as to in which way the casting you proposed could be used and comply with the requirements of the specifications, we find that if used in combination with Blake closet connections illus-

> trated as K–28A on page 43 of Blake's June 1936 catalog, to which we referred in our letter of March 6, 1937, the casting in question would fulfill such requirements.

Plaintiff would not agree to install the Blake connections as it deemed their cost too high.

Following the conferences, Mr. Hitchman, Chief Engineering Inspector of the Puerto Rico Reconstruction Administration, was ordered to investigate the matter and to prepare a report. On June 22, 1937, plaintiff wrote the Administrator that the delay was prejudicial to plaintiff's interests and requested a copy of Mr. Hitchman's report to the Administrator. Such report was furnished to plaintiff on June 24. The pertinent portion of the report of Mr. Hitchman is as follows:

> The bend proposed by the contractor is not originally intended to be threaded and is to some extent weakened by the threading that the contractor is proposing to use on these bends; the proposed connection has no stop ring to check any circular movement in a horizontal plane; the proposed bend does not have a proper seat for a gasket.
>
> In my opinion the bend that the contractor is finally offering will not meet the requirements of the specifications and will not make a job of the quality that the architect deems necessary on work of this class.

27. After receipt of Mr. Hitchman's report, plaintiff by a letter dated June 25, 1937 requested the Administrator to grant an extension of seventy calendar days for the delay in connection with the approval of the closet bend.

On the same day plaintiff also sent to Mr. Egozcue a letter reading as follows:

> Today we have received a letter from that Administration reaching a final decision on the matter of the closet bends for our Contract ER–PR–42, rejecting thereby the samples submitted by us.
>
> As we sustain that the closet bend submitted by us is similar to the JOSAM, as provided by the specifications, we reserve the right to file in due course of time our claim for damages suffered due to the decision reached by that Administration, but as we want to avoid further delays in the progress of the work, we are submitting through Mr. Rafael Rodríguez, samples of the closet bend manufactured by the Blake Specialty Co.

> that we hope will meet with your approval, and your prompt decision on the matter will be greatly appreciated.

The closet bend manufactured by the Blake Specialty Company was rejected in writing on July 3, 1937 by Mr. Egozcue, the reason for the rejection being stated as follows:

> Said sample has been duly examined and found unsatisfactory because upon tests made at this office, it was found that two cast-iron lugs, intended for holding test cap, project too far and prevent the closet outlet horn from fitting the bend satisfactorily.

No exhibit has been presented in evidence to exemplify the Blake closet bend submitted and there is no evidence as to the characteristics of the Blake bend or its equality and similarity to the Josam bend set forth in the specifications.

On the same date, July 3, 1937, plaintiff appealed to the Acting Administrator from the rejection of the Blake closet bend and connection, and requested a further extension of eight days.

28. Plaintiff's representatives then conferred further with the Administrator and as the result of such conferences the Administrator on July 7, 1937 ordered a further investigation.

On July 8, 1937 plaintiff received a copy of a report prepared by Mr. Hitchman, the Chief Engineering Inspector, which report was approved by the Administrator. This report read as follows:

> After careful investigation of the question of the closet bend to be furnished by the Caribbean Engineering Company at the Eleanor Roosevelt site, in which investigation you, Mr. Richard, Mr. Jarrett and myself participated, we have come to the conclusion that the Contractor may be permitted to use closet bend which he has previously purchased, providing he will furnish a cast brass flange. This flange should have a sleeve which will extend at least 2″ below the top of the bend after it is cut off to its proper height. This flange is to be secured with a lead joint.

As the result of this report plaintiff ordered the brass flanges suggested therein and installed them with the Hedges-Walsh-

Weidner bend which it had previously submitted and the closet bend discussion was terminated.

The bends and associated flanges which plaintiff was permitted to install were of the slip-joint type with the brass flanges secured to the bend by a lead and oakum joint. The short end of the bend was open-ended and did not possess a test or sealing cap.

29. Upon termination of the closet bend controversy on July 8, 1937 plaintiff proceeded with the construction work in the normal manner and sequence, and the same was accepted as complete November 24, 1937.

From March 1, 1937 to July 8, 1937, during which period the various types of closet bends were under consideration and none had been approved, the concrete pouring operations could not proceed normally. As set forth in Finding 5, the contract required that the entire system of soil, waste, drain, and vent piping had to be installed and tested before the trenches were backfilled and the piping covered. During this period it was impossible to pour the concrete floor slab, which in turn formed the support for the interior walls and partitions, and it was impossible to proceed with the normal sequence of concrete-pouring operations.

30. Plaintiff on several occasions between March 1 and July 8, 1937 requested permission to pour all of the floor slab except in the bathrooms. Such change in building procedure would have required the incomplete installation and testing of the soil and waste piping prior to the pouring of the major portion of the floor slab and would have required a change order with respect to the contract. Such request was not granted.

On May 19, 1937 plaintiff requested an alternative procedure to circumvent the delay. It requested permission to place the 3″ interior walls on separate concrete footings at no additional expense to the defendant, thus obviating the necessity of pouring the floor slab prior to the erection of the interior walls. This request was referred to Egozcue.

On August 25, 1937 and subsequent to the termination of the closet bend controversy and when plaintiff was proceeding normally, Egozcue issued a change order permitting the

plaintiff to place the interior walls on separate footings. The last two paragraphs of this change order, which was accepted by plaintiff without protest, read as follows:

> There shall be no increase in the contract price because of this change order and no extension of time shall be allowed because of it for the completion of the work covered by the aforesaid contract or by this change order.
>
> This change order shall not become effective until approved by the Administrator, but upon such approval shall be effective as of May 25, 1937.

31. By a letter addressed to the Acting Administrator dated September 6, 1937 the plaintiff reviewed the entire situation regarding the closet bend controversy, and requested an extension of 169 days on account of the delay in approving the closet bends.

The Acting Administrator by a letter dated September 23, 1937 held that a 10-day period extending from plaintiff's appeal of March 8, 1937 (see Finding 22) was a reasonable time in which to consider the appeal, and that the Administration had unduly delayed action upon the appeal for 35 days. The Administrator granted an extension of 35 days. The pertinent portion of the Administrator's letter is as follows:

> On March 6, 1937, this Administration properly rejected a plan submitted by you for the use of the aforesaid closet bend, which you alleged was in accordance with the specifications, from which decision you appealed on March 8, 1937.
>
> It was this Administration's duty to pass upon said appeal and make its decision known to you within a reasonable time. Such reasonable time was ten days; but you were not notified of the decision upon said appeal until April 22, 1937, or thirty-five (35) days in excess of such reasonable time.
>
> The failure of this Administration to act upon said appeal and to notify you of its action within such reasonable time made it impossible to prosecute the work under the contract, and such failure delayed the completion of the said work for the aforesaid period of thirty-five (35) days; and this Administration's said failure was the sole cause which prevented prosecution of the work during

> the said period; and if not for said delay by this Administration such work would have been prosecuted by you at a proper rate of progress.
>
> You duly and promptly submitted to the Administrator notice of the said delay, and of the cause thereof, and proof of the impossibility of prosecuting the work because of it.

Thereafter, the question of further extensions of time was reconsidered by conferences and correspondence, but on December 6, 1937 the Acting Administrator affirmed his decision of September 23, 1937, and no further extensions of time were granted.

32. Under date of December 10, 1937, plaintiff presented a written protest to the Administrator against the deduction of certain sums from a voucher, which protest in full is as follows:

> On November 27th, 1937, we received cheque No. 100038 in the sum of $23,375.88 corresponding to Voucher No. 36,404 dated October 15th, 1937, which voucher we had originally signed in the amount of $25,975.88, showing a suspension of payment in the sum of $2,600.00 which you allege were deducted from the said voucher as liquidated damages for 13 days at the rate of $200.00 per day.
>
> The acceptance by us of the aforesaid cheque No. 100038 in the amount of $23,375.88 does not in any way signify that we accept the deduction of $2,600.00 as justified or legally made, and on the contrary we hereby signify our protest and in conformity with the action of that Administration in so making the said deduction of $2,600.00 from the total amount claimed by us.
>
> We insist and restate that whatever delay has taken place was due entirely to the failure of that Administration to act promptly on matters submitted to it as per our previous correspondence on closet bends, construction materials, etc.

33. During the period from March 19 to April 22, 1937, which is the 35-day period of delay for which the Government subsequently granted an extension, plaintiff attempted to expedite the work as much as possible. During this period plaintiff could not proceed with the normal sequence of operation by pouring the floor slab and carrying up the exterior and interior walls simultaneously, but in-

stead had to proceed with the construction of the 4″ exterior walls, leaving the floor slab and the 3″ interior walls and certain other phases of the concrete work for subsequent pouring operations after the completion of the plumbing. Such procedure necessitated added labor expense during this period in the tying in of the reenforcing steel, in the bracing of wooden forms for the exterior walls, which in this method of procedure could not be interbraced against the forms for the interior walls, and in more frequent movement and setting up of the concrete pouring towers and other equipment.

34. During the 35-day period the plaintiff poured 414.14 cubic yards of concrete at an excess labor cost of $22.10 per yard, totalling $9,152.49. The excess cost per cubic yard was determined by a comparison of the labor cost of concrete operation during this period with the labor cost of concrete operation after normal constructional procedure had been reestablished.

35. The rental value of plaintiff's equipment during the 35-day period was $28.50 per day.

36. The pay roll cost of labor supervision during the 35-day period was $402.

37. During the 35-day period workmen's compensation and insurance items were as follows:

Workmen's compensation	(General Pay Roll) __ 7.82%	$715.72
Workmen's compensation	(Superv. Pay Roll) __ 7.82%	3.14
Property damage	(General Pay Roll) __ 0.5985%	54.78
Property damage	(Superv. Pay Roll) __ 0.5985%	2.41
Public liability	(General Pay Roll) __ 0.48%	43.93
Public liability	(Superv. Pay Roll) __ 0.48%	1.93
		$821.91

38. During the 35-day period the Caribbean Engineering Company was conducting another construction operation under another contract. Plaintiff's president and some of its office force, including its office manager and accountant, devoted 76 percent of their time to the Eleanor Roosevelt Project and 24 percent of their time to the other contract. The following tabulation shows the allocation of office costs

and pay roll to the Eleanor Roosevelt Project during the 35-day period:

Adriano González, Engineer in Charge	76%	$443.33
Manuel E. Balzac, Asst. Engineer	100%	116.67
Héctor Oliveras, Chief Clerk	76%	114.00
José A. Sevillano, Accountant and Paymaster	76%	95.00
Casimiro Stanley, Mechanic	100%	75.00
Messenger	76%	22.80
Cablegram and Telegrams	76%	9.60
Telephone (Office)	100%	7.58
Rentals	76%	29.43
Photographs	100%	14.00
Light (Office)	76%	1.33
Power and light (Field)	100%	18.41
Telephone (Field)	76%	17.63
		$964.78

39. In a further effort to expedite the work during the period of controversy regarding the closet bends the plaintiff on its own initiative used a quick-setting or high early strength cement, instead of the normal specified cement.

During the 35-day period the cost of the high early strength cement used exceeded the cost of the normal cement by a total of $924.04.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover liquidated damages assessed against it for failure to complete on time the contract for the building of certain houses in Puerto Rico for the Puerto Rico Reconstruction Administration, and also to recover damages which it claims it suffered by reason of delays in the construction caused by the defendant.

The contract was completed 137 days after the original completion date. The plaintiff was granted an extension of time of 71 days. It was assessed liquidated damages at $200 a day for the remainder of 66 days, a total of $13,200. The principal controversy is over the delay alleged to have been caused the plaintiff by the failure of the administrator to approve certain closet bends which the plaintiff claims were "similar or equal to" the closet bend specified.

The plaintiff admits that under paragraph 16 of article 8 the decision of the administrator on whether or not these closet bends were "similar or equal to" those specified is final and conclusive, if made in good faith; but plaintiff says that his rejection of them was arbitrary and unreasonable and, therefore, under numerous decisions of this court and of the Supreme Court, we have jurisdiction to review his action. This, of course, is true. The question presented, therefore, is whether or not the action of the administrator in rejecting the closet bends which plaintiff proposed to install was arbitrary or unreasonable.

The other question presented is whether or not an extension of time should have been granted for delay due to bad weather, which the administrator held the plaintiff should have foreseen.

The specifications called for the following closet bends:

> All cast iron closet bends shall be four (4) inches in diameter, similar or equal to type "D Josam," as manufactured by the Josam Mfg. Co., Michigan City, Indiana, U. S. A., Catalog G, page 59.

Plaintiff furnished a closet bend manufactured by the Hedges-Walsh-Weidner Company of Chattanooga, Tennessee. The Hedges-Walsh-Weidner Company in their catalogue advertised two types of closet bends. One of them had a slip-over flange and the other a screw flange. The one plaintiff proposed to furnish was the slip-over flange, and the question is whether or not the decision of the administrator in holding that this closet bend was not similar or equal to the type "D Josam" closet bend was arbitrary or unreasonable.

The two bends are not similar. The Josam bend has the screw flange; the Hedges-Walsh-Weidner bend which plaintiff proposed to furnish had the slip-over flange. This is a material difference, as will be seen. Also, the exposed end of the Josam type bend was sealed to permit testing of the bend and also to prevent débris from collecting in the pipe after installation; the Hedges-Walsh-Weidner type was not so equipped. Quite evidently the two bends were not similar; so the question to be considered is whether or not the Hedges-Walsh-Weidner bend was equal to the Josam bend. The administrator ruled that it was not.

A commissioner of this court has found that the two bends will function equally as well provided they have been properly installed and no obstructions have entered the bends, but he has held that it was more difficult to properly install the Hedges-Walsh-Weidner bends and that it was easier for obstructions to enter them than to enter the Josam bends. He has also found that the Josam bend will probably function properly for a longer time than the Hedges-Walsh-Weidner slip-over type. He has concluded, accordingly, that this type of Hedges-Walsh-Weidner bend and its associated flange were not "similar or equal to" the Josam type "D" bend and its associated flange, and that, therefore, the rejection of the one offered was not arbitrary nor unreasonable. We agree with the commissioner.

A closet bend may be described as the part of the sewer line into which the contents of the closet first discharges. It is a piece of iron pipe bent at a 90-degree angle. One end connects immediately with the sewer line and the other end sticks up through the floor, to which the closet fixture is attached. Over the top of the upright part of the closet bend a flange is either slipped on or screwed on until this flange is in proper position with respect to the floor. That part of the vertical end of the closet bend which projects higher than the proper position for the flange is cut off. A gasket is then placed along the inner edge of the flange and the toilet fixture is forced down against it so as to make a watertight and airtight connection between the toilet fixture and the closet bend.

In order to permanently affix the slip-over flange at its proper location, oakum is first forced between the flange and the toilet bend, after which hot lead is poured on top of the oakum and the two tamped down so as to hold the flange permanently in its proper place. In the Josam type the flange is screwed down on the bend until it is in the proper location, and then by means of a bolt inserted in a hole in the flange it is anchored to the floor, to prevent it from turning.

The commissioner has found that it is more difficult to secure the proper adjustment of the slip-over type flange than of the screw type and that, therefore, good results more often will be obtained by the use of the screw-type flange

than of the slip-over type. We agree that this is so. It appears reasonable to suppose that it would be more difficult to secure the proper adjustment of the slip over type, since it was necessary to maintain it in its proper place while forcing oakum and lead between it and the bend. If great care were exercised, no doubt as good an adjustment could be secured of the slip-over type as could be secured by the screw type; but the defendant in drawing the specifications specified the screw-type flange rather than the slip-over type, presumably because it desired to eliminate the possibility that the requisite care would not be exercised in maintaining the proper adjustment in case the slip-over type were used; it specified a toilet bend with a flange which could be properly adjusted without the exercise of as great a degree of care as was required in the case of the slip-over type. The defendant was entitled to have what it had specified. The bend specified called for the screw-type flange, and not the slip-over type.

Moreover, the commissioner has found that the connection between the flange and the toilet bend was more readily loosened when the slip-over type was used than in the case of the screw-type flange. In the case of a screw-type flange, it would seem that its adjustment could not be altered unless the threads broke, and this appears quite unlikely. On the other hand, since the slip-over type flange is frictionally affixed to the bend by oakum and lead, it may be that its connection would be easier to loosen than the screw type.

Furthermore, the Hedges-Walsh-Weidner type did not come equipped with the sealed end with which the Josam type was equipped. This we regard as a material difference; but we will discuss this feature of the Josam bend later. At any rate, we cannot say that the action of the administrator in rejecting the slip-over type bend was arbitrary or unreasonable. If it was not, then his decision is final and conclusive.

When these toilet bends were rejected, plaintiff proposed an alternative plan of plumbing which would eliminate closet bends, but this plan was rejected by the administration inspector, Mr. Egozcue, Chief of the Slum Clearance Section.

From his action in rejecting the closet bends which plaintiff proposed to furnish and in rejecting plaintiff's plan to eliminate the closet bends altogether, plaintiff appealed to the administrator on March 8, 1937. It was acted upon by the administrator on April 21, 1937, by approving the action of the Chief of the Slum Clearance Section.

On the following day the plaintiff proffered the original bend, with this exception: it had caused the vertical end of the bend to be threaded and had provided a screw-type flange. This was rejected by the administration inspector, Mr. Egozcue, first on April 24, 1937, again on May 5, 1937, and still again on May 12, 1937. On May 18, 1937 the plaintiff appealed to the administrator, and on May 27 the administrator ruled that the proffered bend was not similar or equal to the one specified. A commissioner of this court has found that this action was not arbitrary nor unreasonable.

The proffered bend was identical with the Josam type bend, with two exceptions: (1) the flange did not have a hole for the insertion of a bolt, by means of which the flange could be affixed to the floor to prevent its turning; and (2) the bend did not have the vertical end sealed.

An unanchored flange would be free to turn away from the closet, thus resulting in the loosening of the connection between the fixture and the closet bend. It, therefore, was necessary to prevent the flange from turning. The Josam bend was superior to the one proffered by the plaintiff on April 22, in that the Josam bend made provision for preventing it from turning.

As stated, the vertical end of the Josam bend was sealed. The purpose of this was twofold: (1) to permit testing of the bend for possible leaks; and (2) to prevent débris from getting down into the bend prior to the installation of the fixture. A number of days elapsed between the installation of the bend and of the fixture.

When a bend was used which did not come equipped with a sealed vertical end, a rubber stopper was inserted in the vertical end of the bend in order to test it for leaks. The proof shows that this was equally as satisfactory as the bend which came equipped with the sealed end.

In order to prevent the accumulation of débris in the bends which did not come equipped with the sealed end, it was customary to insert in the open end of the bend burlap or other material. The proof, however, shows that this material was easily removable and occasionally was removed for one purpose or another, in which event, of course, débris such as concrete, shavings, etc., could accumulate in the bend, and sometimes might go so far down into the bend that it could not be discovered by inspection. The Josam type came sealed and remained sealed until the toilet fixture was installed. Since it was impossible for débris to collect in the Josam type bend, and since it was possible for it to collect in the other type, it must be said that the Josam type in this respect was somewhat superior to the type proffered.

It would have been very easy to have remedied the possibility of the turning of the flange proffered by plaintiff by the drilling of holes in the flange for the insertion of a bolt to fasten it to the floor, and the inspector might well have suggested this change to the contractor, and a liberal policy might well have induced him to accept the proffered flange, although it did not have the sealed end; but we cannot say that his action in rejecting the proffered bend as not similar or equal to the one specified was arbitrary or unreasonable. The commissioner did not think it was, and we agree with him.

After the administrator on May 27, 1937 had rejected this bend, plaintiff asked for and was granted a further conference on the matter, following which the administrator ordered the chief engineering inspector to make a further investigation of the matter. Not having heard anything further from the administrator, the plaintiff on June 22, 1937 asked for a copy of the report of the chief engineering inspector. This was furnished to it on June 24, again rejecting the bend as not similar or equal to the one specified. On the following day plaintiff proposed to install a closet bend manufactured by the Blake Specialty Company. (*The administration inspector on May 12 had suggested that the closet bend originally proffered by plaintiff would be satisfactory if it were used in combination with the Blake*

closet connections.) However, the Chief of the Slum Clearance Section on July 3, 1937 rejected the Blake Specialty Company closet bend because, he said, "two cast-iron lugs intended for holding the test cap project too far and prevent the closet outlet horn from fitting the bend satisfactorily." Plaintiff again appealed to the administrator, who ordered a further investigation. On July 8 the administrator, adopting the suggestion of the chief engineering inspector, permitted plaintiff to use the closet bend which it originally proposed to use, providing only that it would substitute for the cast-iron flange a cast-brass flange. This flange was of the slip-over type, and not of the screw type. The plaintiff assented, and this type of toilet bend was installed.

As mentioned above, the administrator delayed from March 8, 1937 to April 21, 1937 in passing upon the closet bend which plaintiff originally proposed to furnish. He has found that this delay was unreasonable, that he should have acted upon plaintiff's appeal within ten days and, therefore, he ruled that plaintiff was entitled to an extension of time within which to complete its contract of 35 days on account of this delay. The plaintiff claims that it is entitled to damages suffered on account of this 35 days' delay, and also claims that it is entitled to damages for the additional delay of 66 days, during which time this controversy was pending, and is also entitled to recover the liquidated damages deducted for these 66 days. We agree with plaintiff that it is entitled to recover the damages it suffered during this 35 days of delay, but we cannot agree that it is entitled to damages for the additional 66 days or to recover liquidated damages deducted therefor.

We cannot say that the action of the Chief of the Slum Clearance Section and of the administrator is free from criticism; but, on the other hand, we cannot say that their action in the matter was beyond the authority conferred upon them by the contract. This being true, the defendant was not responsible for this 66 days' delay and, therefore, the plaintiff is not entitled to recover on account thereof.

The delay was caused, in the first instance, by the plaintiff's *failure to furnish a sample of the closet bends which it pro-*

posed to install, as it was required to do by article 75 of the Technical Specifications. This article provided:

> The contractor shall submit the name of the brand or maker of all plumbing materials and fixtures, together with samples of each for approval of the Chief, Slum Clearance Division, before any of the said materials or fixtures are delivered on the site of the job.

Plaintiff did not comply with these specifications, but ordered and had delivered to the job the closet bends before they had been approved by anyone. Had plaintiff submitted a sample of these proposed bends for approval, nearly all of the delay could have been obviated.

Plaintiff could have obtained the exact bend mentioned. It did not do so because it had been erroneously advised that these bends could not be obtained; but this certainly was not the fault of the defendant. Had plaintiff exercised due care, it could have obtained the exact bend mentioned and there would have been no delay. Moreover, there could have been obtained from the Hedges-Walsh-Weidner Company a bend, in some respects, at least, similar to the Josam-type bend. This company manufactured not only the bend with the slip-over type flange, but also the screw-type flange; but, instead of securing a bend as nearly similar to the type specified as possible, it ordered the type having the slip-over flange, and it failed to secure approval of this type of bend prior to having them delivered on the job. Having thus put itself in error, the plaintiff exerted every effort to secure approval of the bends delivered in order to save itself from loss; but, as we have held, the defendant was within its rights in refusing to approve them. The fact that it later approved substantially the same bend as that first submitted to the plaintiff is not evidence of the fact that this bend was "similar or equal to" the bend specified, but shows only that the administrator and his representatives finally yielded to the exigencies of the occasion and approved something that they really did not want.

The long delay is chargeable principally to the plaintiff. The only delay for which the defendant is properly charged is the unreasonable delay in acting upon plaintiff's protest.

The administrator has found that he unreasonably delayed 35 days. This we think is fair and just. For the damages accruing during this period we think the plaintiff is entitled to recover.

The commissioner has found that during this period the plaintiff poured concrete at an excess cost of $9,152.49, and that the rental value of its equipment was $28.50 per day, or a total of $997.50. He has found that its pay-roll cost of labor supervision during this period was $402, and that Workmen's Compensation and insurance items and plaintiff's overhead totalled $1,786.69. We agree with the findings of the commissioner and, accordingly, we find that the plaintiff is entitled to recover of the defendant the total sum of $12,338.68. For this amount judgment will be rendered.

Plaintiff says that its letter of March 1, 1937 requesting an extension of time should be treated as a letter of protest against the rejection of the bends proffered and that the period of the delay should be computed from this date. We do not think so. It was not a request for a review and reversal of the rejection, but a request for an extension of time. For aught that appears from this letter the plaintiff did not mean to protest the rejection.

Moreover, two days later the plaintiff offered an alternative proposal, thus indicating that it acquiesced in the rejection.

The administrator was not called upon to pass on the rejection until receipt of plaintiff's letter of March 8, 1937 protesting against it.

Plaintiff's other claim is for liquidated damages deducted for a delay of two days due to bad weather. Plaintiff was delayed 34 days due to bad weather conditions. The administrator has held that 32 days of the 34 were unforeseeable. The plaintiff claims it was entitled to an extension of time for the full 34 days. It seems to us the administrator was quite liberal in holding that 32 out of 34 days of bad weather were unforeseeable. The contract does not list bad weather among the unforeseeable causes and, therefore, the case of *Albina Marine Iron Works* v. *United States*, 79 C. Cls. 714, is not in point. To be entitled to an extension on account of bad weather, the bad weather must have been in fact unforesee-

able. Any prudent man would have anticipated that he would have been delayed at least two days by bad weather, if not more.

Plaintiff is not entitled to recover on this item.

Since defendant did not require plaintiff to use the quick-setting cement, and it was used on its own initiative, it is not entitled to recover therefor.

On the whole case, plaintiff is entitled to recover of the defendant the sum of $12,338.68, for which judgment will be rendered. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

ETHAN B. STANLEY AND TAYLOR STANLEY, EXECUTORS OF THE ESTATE OF BLANCHE T. STANLEY, DECEASED, v. THE UNITED STATES

[No. 45178. Decided October 5, 1942]

On the Proofs

Estate tax; transfer of stock to husband without consideration; contemplation of death.—Where decedent, Blanche T. Stanley, wife and mother of the respective plaintiffs, executors, who died on December 21, 1935, at the age of 70 years, had in August, 1935, without consideration transferred to the husband, at his request, 10,000 shares of stock of the corporation of which said husband was the president; and where decedent had for some years prior to such transfer been in ill health; it is *held* that the evidence does not establish that said transfer was not made in contemplation of death, and accordingly plaintiffs are not entitled to recover under the provisions of section 302 of the Revenue Act of 1926, as amended by section 803 of the Revenue Act of 1932 (47 Stat. 169).

Same.—It is not proved that decedent, if she had contemplated life, rather than death, would have given away almost one-third of a large fortune, apparently without hesitation or deliberation, and contrary to the arrangements of her recently revised will, in response to a request which would have carried very little weight in the opinion of a normal person.

The Reporter's statement of the case:

Mr. John C. Taylor for plaintiffs. *Mr. Evert L. Bono* was on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiffs are the duly appointed and acting executors of the Estate of Blanche T. Stanley, who died December 21, 1935, at the age of seventy years. Plaintiffs Ethan B. Stanley and Taylor Stanley are, respectively, the widower and the son of the decedent.

2. December 15, 1936, plaintiffs filed an estate tax return for the Estate of Blanche T. Stanley reporting a gross estate of \$492,707.77, deductions of \$67,041.15, and a net estate of \$425,666.62, on which an estate tax was shown in the amount of \$63,601.99. That tax was paid December 17, 1936.

3. February 23, 1938, the Commissioner of Internal Revenue advised plaintiffs of a proposed increase in the decedent's gross estate and a proposed deficiency on account thereof. Among the increases in the gross estate was an item of \$200,-000 which had not been included in the return as filed by plaintiffs. That item was described by the Commissioner as follows:

	Returned	*Tentatively Determined*
The value of the following described property, transferred by the decedent, is included in the gross estate pursuant to the provisions of Section 302 (c) of the Revenue Act of 1926, as amended, as a transfer made in contemplation of death:		
10,000 shares, The American Laundry Machinery Company	0.00	\$200,000.00

Later, the Commissioner made further adjustments in the return which resulted in a further deficiency. Thereafter, the Commissioner assessed the deficiencies referred to above and plaintiffs paid them as follows:

March 21, 1938	\$38,723.50
March 21, 1938 (interest)	2,323.41
August 25, 1938	6,686.21
August 25, 1938 (interest)	573.79
September 28, 1938 (interest)	3.33

4. April 21, 1939, plaintiffs filed a claim for refund in the amount of $48,306.91 and assigned the following grounds therefor:

> (1) The payment of tax in the sum of $38,723.50 plus interest thereon in the sum of $2,323.41 is a result of the determination of the Commissioner that a gift of 10,000 shares of The American Laundry Machinery Company stock made by the decedent to her husband was in contemplation of death. The taxpayer contends that this is not a fact and that the decedent did not make the gift in contemplation of death but made it solely because her husband had formerly given the stock to her and asked her to return it to him because the Government had begun publishing the holdings of officials of various corporations and that in his position as President of The American Laundry Machinery Company he felt that it was extremely desirable to be able to report larger holdings than he then had.
>
> (2) The tax of $6,686.21 with interest thereon in the sum of $573.79 was paid because of the determination of the Commissioner, concluding that the sum of $30,-000.00 was a part of the gross estate while the taxpayer contends that this $30,000.00 constituted the proceeds of insurance within the meaning of Section 302 (G) of the Revenue Act of 1936. [sic][1]

January 9, 1940, the Commissioner rejected the above claim for refund and assigned as a basis for his action with respect to the first item in the claim the following:

> (1) Review of all available evidence indicates that the transfer of 10,000 shares of American Laundry Machinery Company stock was made by decedent in contemplation of death, in view of her age, state of health preceding and at the time of transfer, and proximity of the transfer to her death. It is therefore included in her gross estate as taxable under the provisions of section 302 (c) of the Revenue Act of 1932 as amended. [sic][2]

After this suit was instituted, a stipulation was filed by the parties under which the second item referred to in the

[1] So in plaintiff's exhibit 9, copy of claim for refund. Should be—section 302 (g), Revenue Act of 1926, 44 Stat. 9, 71.

[2] So in plaintiff's exhibit 11, copy of Commissioner's letter, January 9, 1940; also defendant's proposed findings of fact. Should be—section 302 (c), Revenue Act of 1926, 44 Stat. 9, 70, as amended by Revenue Act of 1932, section 803, 47 Stat. 169, 279.

above claim was waived by plaintiffs, thus leaving as the only issue in the case the question of whether the transfer of the stock in the American Laundry Machinery Company was a gift in contemplation of death. It was further stipulated that the amount involved on account of this issue is $36,820.47 and, if recoverable, should bear interest as follows:

On $3.33 from September 28, 1938;
On $7,260 from August 25, 1938;
On $29,557.14 from March 21, 1938.

5. Plaintiff, Ethan B. Stanley, husband of the decedent, was one of the founders of the American Laundry Machinery Company which was organized in 1907, and was chairman of its executive committee for many years. He has been president of the company since 1925. On each of the following dates, August 24, 1917, March 5, 1918, and March 26, 1918, he made a gift to the decedent of 1,000 shares of stock in the American Laundry Machinery Company. That stock had a par value of $100 a share and the 3,000 shares which he thus gave to his wife constituted approximately half of his holdings. As a result of stock dividends and readjustments in the par value of the stock, the shares received by the decedent from her husband had increased to 16,000 by August 1935. Her husband held approximately the same number of shares at that time. At that time the husband was the largest stockholder of the active officers, but the total outstanding stock of 587,024 shares was widely held. It was listed on both the Cincinnati Stock Exchange and the New York Curb Exchange and there were approximately 5,000 stockholders.

6. About April 1935, the interest of Ethan B. Stanley was aroused in the requirement of the Securities and Exchange Commission that corporations whose stock was listed on exchanges must make public the salaries of their officers with their respective stockholdings, and newspaper items were appearing showing the salaries and stockholdings of various officers in various companies. During the next month or two, the husband indicated to the decedent that in the event of the publication of that type of information with respect to the American Laundry Machinery Company he would like to show ownership of a larger number of shares of stock of the company and suggested to her the transfer to him of

some of her stock. The decedent acquiesced in the proposal. The husband discussed the matter with his lawyer who advised him that in view of the importance of the matter, there should, in the event that transfer was made, be present at that time persons in addition to the members of the family. As will hereinafter appear, the decedent was then an invalid. Acting on the lawyer's advice, a discussion was had with the decedent on August 12, 1935, as to the transfer of stock which was to be made by her to her husband. There were present, in addition to the decedent and her husband, the decedent's physician, her son, and her nurse. The husband explained to the decedent his desire to have her transfer to him 10,000 shares of stock in the American Laundry Machinery Company for the reasons heretofore given and the decedent indicated that she had no objection to making the transfer. At that time the decedent's physician discussed various matters with the decedent from which he assured himself that she was mentally capable of making the transfer and that she was aware of the act which she was performing. At neither of these meetings nor at any other time in discussions between the decedent and her husband of this transfer was any mention made of the decedent's expectation or contemplation of death, nor of any tax savings which might result to her estate because of the gift.

August 16, 1935, in the presence of her son, Taylor Stanley, her husband, Ethan B. Stanley, a notary public, and a nurse, the decedent executed a power of attorney in favor of her son empowering him to transfer 10,000 shares of her stock in the company to her husband. The decedent was in bed at the time she signed the power of attorney, and because of her position in bed and the unsteadiness of her hand due to her physical condition, her son held her hand while she executed the instrument.

7. August 17, 1935, Taylor Stanley, the son, acting under the power of attorney referred to in the preceding finding, executed the necessary assignments on the reverse side of the stock certificates transferring the 10,000 shares of stock to his father, Ethan B. Stanley. At that time and for many years prior thereto the husband, Ethan B. Stanley, had had a general power of attorney to act for the decedent, and he

and the decedent also maintained a joint bank account in which dividends from stock, proceeds of the sale of stock, and other funds were deposited. The husband had a substantial income and this stock was not required by him because of any financial need of the income therefrom.

As hereinbefore found, decedent died December 21, 1935, about four months after the gift.

On or about March 12, 1936, plaintiffs filed a gift tax return on behalf of the decedent on account of the above transfer showing a gift tax due of $6,562.52. Plaintiffs paid that tax March 12, 1936, and the Commissioner in the determination of the estate tax deficiencies referred to above made an appropriate adjustment for that gift tax payment.

8. June 4, 1933, decedent had executed a will under which she provided for the creation of a trust fund of $50,000, the income and principal of which were to be disposed of as follows:

> The net income of said trust shall be paid by the said trustees quarterly to my husband, Ethan B. Stanley, during his life. Upon the death of my said husband the said income shall be paid to my grandson, Taylor Stanley, Jr., if he be living, until he shall reach the age of thirty-five (35) when the principal shall be turned over to him and the trust terminated, but should he die within the age of thirty-five (35) years then (my husband being dead), the principal shall go at once to my son, Taylor Stanley.

The remainder of her property was by this will left to her husband.

March 12, 1935, the decedent executed a codicil to her will which read as follows:

> This is a codicil to my will. Instead of leaving all the residue of my estate to my husband, Ethan B. Stanley, outright, as I have done by Item II, I revoke that item and give my said husband, Ethan B. Stanley, my half in our homestead property outright and leave all the balance of the residue of my estate in trust and direct that Ethan B. Stanley shall have all the income of it during his life, and then my son, Taylor Stanley, shall have all the income of it during his life, and then it shall all go outright to Taylor's children. My husband, Ethan B. Stanley, is to be the Trustee as long as he lives and

have complete power to buy and to sell, borrow or do anything else with regard to my estate that I might do if living, and all without any bond or order of court or legal restriction whatever and after the death of my said husband, Ethan B. Stanley, the trustee is to be whoever he may name in his will, with the same powers and without bond. In all other respects my Will is to stand as written.

9. September 26, 1935, the decedent took out a life insurance policy in the amount of $30,000 and purchased an annuity contract, both being effective October 1, 1935. Each was a single premium policy, the premium on the annuity contract being $6,642.49, and the premium on the life insurance policy $25,966.20. The insurance company would not have issued the life insurance policy without the annuity contract, and both were entered on the company's books as a single combination contract. The application for the policies was signed by Ethan B. Stanley for the decedent, who took no medical examination.

What part, if any, the decedent took in arranging for the policy and the annuity contract does not appear.

10. In August 1935, when the decedent made the transfer of the 10,000 shares of stock of the American Laundry Machinery Company referred to in finding 7, she had been an invalid for some years on account of a spinal ailment. This condition began about 1928 or in the early part of 1929. As a result thereof in the early summer of 1929, a local physician was consulted who recommended that she obtain treatment therefor in New York City. On that recommendation decedent was taken by her husband to Dr. Ellsberg's Neurological Hospital where she received X-ray treatments from August to December 1929. At that time she had a deformation at the third lumbar vertebra which was caused by a giant cell sarcoma or tumor growth slightly to the left of the vertebra. Dr. Ellsberg told the decedent and her husband that there was no malignancy in the tumor; that the only difficulty was that there was a small cavity in her spine where a part of a vertebra had disappeared but that it would fill up with calcium deposit, and that she would completely recover. On her return to her home from New York City in December 1929, she was confined to her bed for several weeks and had

a nurse in attendance. Thereafter she was able to be up and lead a normal life, going shopping, looking after her household, and taking trips.

11. In the early part of 1933 the condition in her back again began giving her trouble. X-ray treatments were at first given in Cincinnati by one physician, but satisfactory results were not obtained and another physician was called in about September or October 1934. The latter, after consultation with still another physician, decided upon the use of radium treatments. As a result of that decision a physician from Chicago, who specialized in radium treatments, came to Cincinnati and gave her such treatments beginning late in 1934 or in January 1935. In addition to radium, she was given some diathermic treatments. The illness was diagnosed as the same as that for which she was treated in New York City in 1929 and was described as a benign giant cell sarcoma about the size of a golf ball. Satisfactory results were obtained from the radium treatments.

In addition to the trouble with her back, the decedent had a gall bladder attack in March 1933 and an attack of pyelitis in 1934, the latter recurring from time to time as long as she lived. She was never able to walk from about March 1933 to the time of her death, having to move about in a wheel chair. Two nurses were in constant attendance from the spring of 1933 until the time of her death. Because of her long confinement and her illness both of the decedent's legs had atrophied and there was very little muscular tissue on them.

12. The decedent was of a cheerful disposition and took an active interest in her household until a short time prior to her death. She was a Christian Scientist and at no time did she discuss death or in any way indicate that she expected to die from her illness. Until shortly before her death she was planning for the future, contemplating the education of her grandson, and making plans for Christmas.

13. On December 20, 1935, the decedent had a sudden heart attack and died a few hours later. The attending physician's death certificate described the cause of her death as "Acute cardiac dilatation, result of coronary sclerosis and occlusion which was part of generalized vascular sclerosis,"

with contributory or secondary causes of "sarcoma of the spine" and "generalized vascular sclerosis."

14. The 10,000 shares of stock of the American Laundry Machinery Company transferred by the decedent to her husband within two years of her death without consideration in money or money's worth, as shown in findings 6 and 7, constituted a material part of the decedent's property. The evidence is insufficient to justify a finding that the decedent did not make the transfer here in question in contemplation of death.

The court decided that the plaintiffs were not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The question here is whether a gift was one made "in contemplation of death" so that the property given was required to be included in the donor's estate for purposes of taxation, or was, on the other hand, an ordinary gift *inter vivos* which separated the given property from the rest of the estate and subjected the given property only to the applicable gift tax. The amount of the difference in the taxes is $36,820.47.

The facts relating to the condition of the donor's health and state of mind, and the events preceding and accompanying the gift, are related in findings 5 to 14. We have, then, a case in which the decedent on August 16, 1935, made a gift of stock of a value of $200,000.00 and died on December 21, 1935, leaving a gross estate of a little less than $500,000.00.

The Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302, as amended by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, provided:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> *   *   *   *   *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or

> otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

The presumption stated in the last sentence of the section is applicable. The Commissioner of Internal Revenue concluded, after consideration of plaintiffs' claim for a refund of the estate taxes paid, that the gift had been made in contemplation of death.

Our problem is whether plaintiffs have proved that the gift was not made in contemplation of death. The advanced age of the decedent, her helpless condition, and the several serious maladies which had afflicted her for some two years prior to the making of the gift point in the same direction as the statutory presumption. Plaintiffs urge, however, that the reason for the gift was that decedent's husband asked for it, for the purpose of being able to show a larger holding of the stock if the Securities and Exchange Commission should obtain and publish information as to his holdings.

The decedent had, by a will executed in 1933, left substantially all of her property to her husband. On March 12, 1935, not long before he requested the gift from her, she had made a codicil to her will in which she gave him outright only her half of the homestead, placing the rest of her property in trust for him for life, then for their son for life, then for the son's children absolutely. The husband's request, in these circumstances, tends to show that he was seeking to obtain by gift a considerable part of what the codicil had denied him. But he did not act with such haste as might have been expected if he had anticipated her early death. There seems to have been some delay, though the proof does

not show how much, between the time he obtained her assent and the time he consulted his lawyer about the conveyancing. That consultation took place in June, yet he did not have the transaction completed until August.

On the other hand, his deliberation in bringing about the transfer makes one doubtful as to whether his real reason for wanting the stock was the one he expressed. If the Securities and Exchange Commission was already publishing the holdings of officers of some companies, he could hardly have had any assurance that his company would not be reached during the months that intervened between his request and the receipt of the stock. The evidence does not satisfy us that the husband's real reason for asking for the gift was that he wished to make to the Securities and Exchange Commission a showing of larger holdings of the stock.

Perhaps the husband's real reason is immaterial. Perhaps the reason which he expressed to the decedent and she believed is all that is material. We are, however, persuaded from all the circumstances of the case that the decedent would not have given away almost one-third of a large fortune, apparently without hesitation or deliberation, and contrary to the arrangements of her recently revised will, in response to a request based upon a reason which it seems to us would have carried very little weight in the opinion of a normal person. We think it probable that the reason that she did acquiesce was that she was ill and helpless and for that reason fairly indifferent as to the disposition of her property so long as it was kept within her family. We think that such a gift of property is made, not in contemplation of life, but of death.

That the husband at least was conscious of the problem of estate taxes is shown by the fact that within a month after the gift, he used the general power of attorney which he held from the decedent to purchase, with her money, single premium life and annuity policies for a combined purchase price larger than the face of the life policy. This move could hardly have had any other motive than that of minimizing estate taxes. That it would be ineffective for that purpose was not known at that time. See *Helvering* v. *Le Gierse*, 312 U. S. 531.

Plaintiffs have not produced evidence which has persuaded us that the gift was not in contemplation of death. Their petition will, therefore, be dismissed.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE COCA-COLA COMPANY v. THE UNITED STATES

[No. 45208. Decided October 5, 1942]

On the Proofs

Income tax; transfer of assets by foreign subsidiary to domestic subsidiary; dividend to parent corporation; reorganization.—A transfer of assets by a foreign subsidiary to a domestic subsidiary of plaintiff in exchange for a stock issue of the domestic subsidiary, followed by a dividend of said foreign subsidiary paid to plaintiff, sole stockholder, in such stock, *held* to be a transfer of assets through reorganization, and hence nontaxable under the provisions of section 112 (g) of the Revenue Act of 1928 (45 Stat. 791).

Same; definition of "reorganization" in section 112 (i) of Revenue Act of 1928.—Where plaintiff, a Delaware corporation, was the owner of all of the outstanding capital stock of the Coca-Cola Company of Canada, Ltd., and was also the owner of all of the outstanding capital stock of the Rohawa Company, also a Delaware corporation; and where, in order to supply the Rohawa Company with funds for the purposes for which said Rohawa Company was organized, the Canadian Company transferred to the Rohawa Company in 1931 certain assets in return for the issuance to said Canadian Company of 30 shares of new stock of the Rohawa Company; and where, immediately thereupon, the Canadian Company distributed the 30 shares of Rohawa stock to plaintiff without the surrender by plaintiff of any of the stock which plaintiff owned in the Canadian Company; and where all of these transactions were carried out in pursuance of a plan evolved by plaintiff which controlled all of the corporations in question, and thereafter all of the corporations remained in existence, and continued to carry on their normal functions as theretofore; it is *held* that such transaction comes clearly within the definition of a "reorganization" as set out in section 112 (i) of the Revenue Act of 1928 (45 Stat. 791), and plaintiff is entitled to recover.

Same; transactions to avoid taxation closely scrutinized.—Where a transaction is carried out in a particular manner admittedly to minimize or avoid tax, such transaction should be scrutinized closely in order to determine whether the statute has been strictly complied with. *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States*, 254 U. S. 141; *Gregory* v. *Helvering*, 293 U. S. 465; *Chisholm* v. *Commissioner*, 79 Fed. (2d) 14. The transaction must be real and "undertaken for reasons germane to the conduct of the venture in hand."

Same; purpose of transaction.—In the instant case it is *held* that the underlying purpose for the transaction in question was of a genuine business nature; none of the corporations involved was a "dummy," and the purpose accomplished, which was the transfer of funds, was nothing new.

Same.—Taxpayers are not required to carry out their transactions in a way that will produce the most tax for the Government. *Gregory* v. *Helvering, supra.*

Same.—Where transaction was carried out by corporate taxpayer in particular manner in order to make its taxes as low as possible; and where such transaction was real and not a sham; it is *held* that such purpose was not fatal to taxpayer's claim for refund of alleged overpayment.

Same; provision in 1928 Act eliminated in later statutes.—Where the provision of the 1928 Internal Revenue Act, which exempted stock distributed pursuant to plan of reorganization in computing gain of stockholder, was eliminated in later tax statutes; it is *held* that such elimination did not affect a transaction which was completed while 1928 Act was still in effect.

Same; purpose of Congress in Revenue Act of 1928.—In the enactment of section 112 (g) of the Revenue Act of 1928 it was the purpose of Congress to permit through reorganization the shifting of funds or assets from one *bona fide* corporation to another under the same control in order to meet changing conditions and needs which might make such transfer desirable.

The Reporter's statement of the case:

Mr. John E. McClure for the plaintiff. *Messrs. O. H. Chmillon, David W. Richmond, Miller & Chevalier, Spalding, Sibley, Troutman & Brock*, and *Miss Maude Ellen White* were on the briefs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

THE FIRST CAUSE OF ACTION

1. Plaintiff is a Delaware corporation which was organized September 11, 1919, with its corporate office and principal place of business located at Wilmington, Delaware. Its business and that of its subsidiaries and affiliates is the manufacturing, selling, bottling, distributing, and marketing of a syrup and soft drink, both under the trade-mark "Coca-Cola."

2. March 15, 1932, plaintiff filed a consolidated income tax return on behalf of itself and its affiliated domestic subsidiary corporations for the taxable year ending December 31, 1931, which return showed a consolidated net income of $14,191,010.55 and a tax due of $1,662,458.78. That tax was paid as follows:

March 15, 1932	$415, 614. 70
June 13, 1932	415, 614. 70
September 14, 1932	415, 614. 69
December 14, 1932	415, 614. 69

3. Thereafter upon an audit of that consolidated income tax return the Commissioner of Internal Revenue advised plaintiff that the consolidated net income for the taxable year 1931 had been adjusted to $19,388,314.64 and that the adjustments resulted in additional income tax due from plaintiff in the amount of $166,547.61 plus interest in the amount of $61,951.15. After appropriate assessment, plaintiff paid $210,702.62 of the total amount in cash June 8, 1938, and the balance ($17,796.14) was satisfied by a credit on or about May 27, 1938, by the application of an overpayment of taxes and interest for the calendar year 1930.

4. August 31, 1938, plaintiff filed a claim for refund for the calendar year 1931 in the amount of $228,498.76 and assigned as the principal ground for recovery that stock of a subsidiary company, The Rohawa Company, which had been received by plaintiff under certain circumstances hereinafter set forth, did not constitute a taxable dividend.

5. On or about November 29, 1939, the Commissioner, on a reexamination of plaintiff's consolidated income tax re-

turn for 1931 and on consideration of the claim for refund referred to above, determined that plaintiff's consolidated net income for 1931 amounted to $19,299,976.58, and that its income tax liability for that year amounted to $1,796,356.91, and issued a certificate of overassessment in the amount of $44,794.19 representing an overpayment of tax in the amount of $32,649.48 and an overpayment of interest in the amount of $12,144.71, which amounts (together with interest thereon as provided by law in the amount of $3,962.14) were refunded to plaintiff. January 11, 1940, the Commissioner notified plaintiff by registered mail that the remainder of the claim for refund was rejected.

6. In making the determination as set out in the preceding findings, the Commissioner included in plaintiff's taxable income an amount of $5,109,608 representing the fair market value of thirty shares of no par value stock of The Rohawa Company as constituting a taxable dividend from a foreign corporation.

7. The Coca-Cola Company of Canada, Ltd., hereinafter sometimes referred to as the Canadian Company, was a Canadian corporation organized September 29, 1923, and its entire capital stock was owned by plaintiff. The Rohawa Company was a Delaware corporation organized February 5, 1926. On June 27, 1931, it had outstanding twenty shares of capital stock, all of which was owned by plaintiff and which had been issued as set out in finding 10. On the latter date The Rohawa Company issued thirty additional shares of its stock to the Canadian Company for assets having a value of $5,109,608, and the Canadian Company immediately transferred the thirty shares of stock to plaintiff for reasons and under circumstances which will hereinafter appear.

8. By 1927 plaintiff's business and that of its subsidiaries had already proved very successful, its net income for 1927 amounting to more than $9,000,000. At this time there were in existence approximately 1,100 plants for the bottling of Coca-Cola throughout the country which plants with one or two exceptions were owned and operated independently of plaintiff. Some of these bottling plants were not being efficiently and profitably operated. About 1926 plaintiff

decided upon an expansion program under which it would acquire bottling plants located at strategic points throughout the United States, improve their operating facilities, develop their territories, and put them on a profitable basis as an example for other outside bottlers of Coca-Cola.

9. The Rohawa Company was incorporated as a subsidiary of plaintiff in order to acquire and develop these bottling plants. At that time plaintiff had a board of directors consisting of nineteen members scattered throughout various sections of the United States and for this reason it was sometimes difficult to conduct business expeditiously. The Rohawa Company at first had a board of directors consisting of three members which was later increased to five, all of whom were officers or employees of the plaintiff and located in the same building so that special meetings could be held when necessary. The formation of The Rohawa Company thus provided a less cumbersome and more flexible method of acquiring and operating the bottling plants. Another reason for the organization of The Rohawa Company was to enable plaintiff to acquire its own Class A and common stock in the open market without its becoming generally known to the public.

10. The Rohawa Company was dependent on plaintiff for financing and it was necessary in order to enable The Rohawa Company to purchase and finance the bottling plants for plaintiff to make capital contributions to The Rohawa Company from time to time. The following tabulation shows the changes in the capital stock and capital surplus accounts of The Rohawa Company from March 1, 1927, through December 14, 1935, the name The Coca-Cola Company appearing therein having reference to plaintiff:

March 1, 1927:	
Original investment of $1,000,000 cash in The Rohawa Company by The Coca-Cola Company:	
10 shares Common Stock (no par)	$1, 000. 00
Contributed Surplus	999, 000. 00
	1, 000, 000. 00
November 19, 1928:	
Additional cash investment by The Coca-Cola Company to The Rohawa Company's contributed surplus	1, 000, 000. 00

April 8, 1930:

The Coca-Cola Company purchased for cash an additional 10 shares Common Stock (no par)	$702,800.00

June 11, 1930:

Additional contribution to surplus consisting of 193,686 shares of The Coca-Cola Company's Class "A" Stock [1] having a value of	9,442,066.45

June 27, 1931:

30 shares Common Stock (no par) issued to The Coca-Cola Company of Canada, Ltd., in exchange for:	
31,204 shares of the Coca-Cola Company's Class "A" Stock [1]	1,610,906.50
U. S. Government Bonds	3,400,000.00
	5,010,906.50

February 29, 1932:

The Coca-Cola Company made an additional contribution to surplus of amounts aggregating $2,055,948.13, representing loans previously made to The Rohawa Company.

December 30, 1933:

The Coca-Cola Company made a further contribution to surplus of amounts aggregating $439,865.61, representing loans previously made to The Rohawa Company.

December 30, 1933:

The Rohawa Company issued 50 shares of Common Stock (par value of $5.00 per share) to The Coca-Cola Company in exchange for:

The Capital Stock of the following companies:	
New England Coca-Cola Bot. Co.	250,000.00
New England Coca-Cola Bot. Co.	250,000.00
Coca-Cola Bot. Co. of Conn	50,000.00
The Coca-Cola Bot. Co. (Atlanta)	4,946,223.97
	5,246,223.97
And Accounts Receivable Against:	
New England Coca-Cola Bot. Co.	117,519.87
Coca-Cola Bot. Co. of Conn	305,132.17
	5,668,876.01
Amount credited to Capital Stock	250.00
Amount credited to Capital Surplus	5,668,626.01
	5,668,876.01

[1] The Class A stock paid dividends during the periods here involved of $3.00 per share.

January 31, 1934:

The Coca-Cola Company made an additional contribution to Surplus of $952,500.00 representing advances for purchase of Common Stock of The Coca-Cola Company.

November 30, 1934:

After setting up a Reserve for Subsidiary Losses at 9-30-34, amounting to $1,012,459.72, out of earned surplus, The Rohawa Company declared a dividend in kind consisting of 200,000 shares of The Coca-Cola Company Class "A" Stock,[1] having a value of $9,767,109.50, payable to The Coca-Cola Company.

November 30, 1934:

Said stock being transferred for purpose of retirement.

$2,303,342.88 of the amount of the above dividend was charged against earned sulplus, being the balance remaining in the earned surplus account after providing for subsidiary losses at September 30, 1934.

$7,463,766.62, representing the remainder of the above dividend, was charged against Capital, or Contributed Surplus.

March 2, 1935:

A dividend in kind, consisting of 14,100 shares of the Common Stock of The Coca-Cola Company, was declared.

The value of the dividend, represented by cost of stock was	$1, 319, 711. 72
Earned Surplus available for dividends	66, 096. 92
Balance charged against Capital Surplus	1, 253, 614. 80

November 2, 1935:

A dividend in kind, consisting of 124,520 shares of Class "A" Stock[1] of The Coca-Cola Company was declared.

The value of the dividend, represented by cost of stock was	6, 360, 903. 92
Earned Surplus available for dividends	470, 635. 86
Balance charged against Capital Surplus	5, 890, 268. 06

[1] See footnote on preceding page.

December 14, 1935:

A cash dividend was declared in the amount of	$1,000,000.00
Earned Surplus available for dividends	675,399.33
Balance charged against Capital Surplus	324,600.67

11. Pursuant to the purposes for which it was formed, The Rohawa Company acquired three bottling companies in 1928, three in 1929, two in 1930, five in 1931 (two of which were merged), one in 1932, and four in 1933. The balance sheets of The Rohawa Company from the beginning of its operations on March 1, 1927, to July 31, 1936, show the details of its investments in these various bottling companies, the advances or loans to the bottling companies so acquired, amounts borrowed by The Rohawa Company from plaintiff or its affiliates, and other facts as set out in Appendix A.

The investments by The Rohawa Company in these bottling companies are set out in the foregoing balance sheets under the heading "Inter-Company Investments" and represent the amounts paid for these subsidiaries, either for their capital stock or their assets. The amounts shown in these balance sheets under the heading "Inter-Company Accounts Receivable" show the cash or merchandise advanced to these companies by The Rohawa Company. In the "Inter-Company Accounts" in these balance sheets are shown amounts owing by The Rohawa Company to plaintiff and its affiliates, which amounts represent loans or advances to The Rohawa Company.

During the period from December 31, 1928, to December 3, 1934, the property, plant, and equipment accounts of the bottling companies acquired by The Rohawa Company increased from $164,071.23 to $1,604,142.72.

12. During the early part of the period when these bottling companies were being acquired and their plant facilities improved, the net result of their operations was a loss. However, from 1934 until 1940 substantial profits were shown. The following tabulation shows the balance (or deficit) in the surplus account of these various bottling companies (subsidiaries of The Rohawa Company) at the

beginning of each year, the profit or loss during each year, dividends paid, and the balance at the end of each year:

	Balance beginning	Profit or (loss)	Dividends paid	Balance Dec. 31
1928	0	($77,421.60)	0	($77,421.60)
1929	($77,421.60)	(9,583.41)	0	(87,005.01)
1930	(87,005.01)	49,125.70	0	(37,879.31)
1931	(37,879.31)	33,420.91	$550,000.00	(554,458.40)
1932	(554,458.40)	(12,860.03)	165,436.27	(732,754.70)
1933	(732,754.70)	[1] (58,652.32)	0	(791,407.02)
1934	[2] (429,852.91)	685,166.33	919,724.67	(664,411.25)
1935	(664,411.25)	1,034,990.10	1,294,377.61	(923,798.76)
1936 [3]	(923,798.76)	1,681,633.49	1,541,000.00	(783,165.27)
1937	(783,165.27)	2,056,062.65	1,810,000.00	(537,102.62)
1938	(537,102.62)	1,933,839.20	775,000.00	621,736.58
1939	621,736.58	2,459,667.88	850,000.00	2,231,404.46
1940	2,231,404.46	2,342,882.76	1,100,000.00	3,474,287.22

[1] Loss from operations was reduced $9,900 by Class "A" Dividend received by The Coca-Cola Export Corporation.

[2] Surplus Balance was adjusted by $361,554.11 net due to acquisition of The Coca-Cola Bottling Company—Atlanta, New England Coca-Cola Bottling Company, and Coca-Cola Bottling Company of Connecticut and disposition of The Coca-Cola Export Corporation, Sethness Products Company, and Atlanta Baseball Corporation.

[3] The Rohawa Company was dissolved in 1936 and Subsidiaries transferred to The Coca-Cola Company. Beginning with year 1936 and through year 1940, Companies formerly held by The Rohawa Company are included.

13. Due to the losses which were being sustained by the bottling companies during their early period of development and in order that The Rohawa Company would have an adequate income to finance these companies during their period of development, various contributions were made to the surplus account of The Rohawa Company from time to time as shown in Finding 10. One of the changes in the capital account of The Rohawa Company gave rise to one of the major issues in this suit, namely, the change which occurred on June 27, 1931, through which The Rohawa Company increased its capital stock and acquired certain assets of the Canadian Company. That transaction was carried out in the following manner:

(a) June 17, 1931, a special meeting of the board of directors of The Rohawa Company was held at 10 a. m. in Atlanta, Georgia, with the following directors present: R. W. Woodruff, Harold Hirsch, A. A. Acklin, Harrison Jones.

The question under consideration at that meeting was a plan of reorganization which required an increase in the capital stock of The Rohawa Company whereby such increased capital stock would be exchanged for certain assets

of the Canadian Company and the stock received therefor by the Canadian Company would be distributed to plaintiff. A resolution was adopted by the board of directors which provided for the increase of the authorized capital stock of The Rohawa Company to fifty shares without nominal or par value and that such stock might be issued by the corporation for such consideration as might be fixed from time to time.

(b) Immediately after the meeting referred to above, namely, June 17, 1931, at 10:30 a.m., a special meeting of the stockholders of The Rohawa Company was held in Atlanta, Georgia, at which meeting it was voted to increase the capital stock of The Rohawa Company from twenty shares no par value to fifty shares no par value as recommended by the board of directors at its special meeting which had just been held.

(c) Immediately after the stockholders meeting, namely, at 10:45 a.m. on June 17, 1931, another special meeting of the board of directors of The Rohawa Company was held in Atlanta, Georgia, at which time a resolution was adopted reading so far as here material as follows:

> Whereas, it is the desire, pursuant to the plan of reorganization that this corporation make an offer to The Coca-Cola Company of Canada, Ltd., to acquire certain assets of The Coca-Cola Company of Canada, Ltd., by issuing stock in this corporation in exchange therefor:
>
> Now, Therefore, Be It Resolved, that this corporation acquire the following described assets of The Coca-Cola Company of Canada, Ltd., pursuant to the plan of reorganization, to-wit:
>
> 31,204 shares Class "A" Stock of The Coca-Cola Company valued at $1,610,906.50:
> $1,400,000.00 U. S. Bonds 3⅜% due June 15, 1949,
> $1,000,000.00 U. S. Bonds 3¾% due June 15, 1941,
> $1,000,000.00 U. S. Bonds 3⅛% due June 15, 1946,
>
> in exchange for thirty shares of the capital stock of this corporation.

The plan of reorganization referred to in the above resolution and which plan was adopted read in part as follows:

> The Coca-Cola Company of Canada, Ltd., a Canadian corporation, was to transfer to The Rohawa Company,

a Delaware corporation, certain surplus assets in exchange for a certain number of shares of stock in The Rohawa Company, a Delaware corporation, which shares of stock were to be issued by The Rohawa Company to The Coca-Cola Company of Canada, Ltd. The Coca-Cola Company of Canada, Ltd., was to immediately distribute to its sole shareholder, The Coca-Cola Company, a Delaware corporation, the shares of The Rohawa Company's stock that the Canadian Company received, so that The Coca-Cola Company, a Delaware corporation, would then own the entire capital stock of The Rohawa Company, and no stock of The Coca-Cola Company of Canada, Ltd., was surrendered by The Coca-Cola Company, a Delaware corporation.

(d) On June 17, 1931, at 11 a. m., a special meeting of the board of directors of the Coca-Cola Company of Canada, Ltd., was held at Atlanta, Georgia, with the following directors present: R. W. Woodruff, Eugene Kelly, Harold Hirsch, Harrison Jones, A. A. Acklin, and S. F. Boykin.

At that meeting a resolution was adopted to the effect that pursuant to the plan of reorganization referred to in subsection (c) above, the Coca-Cola Company of Canada, Ltd., would exchange certain of its assets for thirty shares of the capital stock of The Rohawa Company and immediately distribute to its sole stockholder, plaintiff, the shares of stock of The Rohawa Company received by it.

The above directors of the Canadian Company occupied the following positions with plaintiff: R. W. Woodruff was president of plaintiff and a member of its board of directors. Eugene Kelly was not an officer or director but was employed by plaintiff and was president of the Canadian Company. Harold Hirsch was general counsel of plaintiff and a member of its board of directors. Harrison Jones and A. A. Acklin were vice presidents of plaintiff, and S. F. Boykin was its treasurer. Two other directors of the Canadian Company, who were not present, were C. E. Duncan and E. W. Grant who were treasurer and assistant treasurer, respectively, of the Canadian Company. As shown in subsection (a) above, Messrs. Woodruff, Hirsch, Acklin, and Jones were also directors of The Rohawa Company.

14. Pursuant to the corporate actions taken, as set out in the preceding finding, The Rohawa Company increased its capital stock to fifty shares and on June 27, 1931, issued

to the Coca-Cola Company of Canada, Ltd., the thirty shares of its capital stock representing the increase thereof in exchange for property of the Coca-Cola Company of Canada, Ltd., which had a then value of $5,109,608 and consisted of the following assets:

31,204 shares of class A stock of plaintiff;
$1,400,000 U. S. Bonds 3⅜% due June 15, 1947–43;
$1,000,000 U. S. Bonds 3⅜% due March 15, 1943–41;
$1,000,000 U. S. Bonds 3⅛% due June 15, 1949–46.

Also pursuant to the corporate actions set out above, the Coca-Cola Company of Canada, Ltd., upon receipt of the thirty shares of capital stock of The Rohawa Company, distributed to plaintiff, its sole stockholder, these thirty shares of stock of The Rohawa Company without the surrender by the plaintiff of the stock which it owned in the Coca-Cola Company of Canada, Ltd.

15. Plaintiff did not receive in the year 1931 any of the assets of the Canadian Company which were transferred to The Rohawa Company in the transaction referred to in the preceding finding. The United States bonds received by The Rohawa Company in that transaction were sold by it in 1931 and the proceeds used to purchase class A stock of plaintiff. This class A stock and other stock of a like kind of plaintiff held by The Rohawa Company paid a dividend of $3.00 annually throughout the period of The Rahawa Company's existence and furnished substantial funds for The Rohawa Company with which to defray expenses and make capital expenditures.

16. The plan of expansion for the acquisition and improvement of bottling plants proved successful and by 1934 substantial profits began to be realized by these subsidiaries of The Rohawa Company. These profits largely passed into The Rohawa Company in the form of dividends, as shown by finding 12 where dividends amounting to $919,724.67 were paid to The Rohawa Company in 1934. With the successful operation of the subsidiaries of The Rohawa Company and the receipt by the latter Company of substantial dividends, The Rohawa Company in 1934 began making large distributions from its surplus account in the form of divi-

dends or distributions to plaintiff, its sole stockholder and parent company, as follows:

November 30, 1934, a dividend in kind consisting of 200,000 shares of plaintiff's class A stock having a value of $9,767,109.50;

March 2, 1935, a distribution in kind consisting of 14,100 shares of plaintiff's common stock having a value of $1,319,711.72;

November 2, 1935, a dividend in kind consisting of 124,520 shares of class A stock of plaintiff having a value of $6,360,903.92;

December 14, 1935, a cash dividend of $1,000,000.

The Rohawa Company began paying dividends to plaintiff from earnings and profits in 1933 and from that time until it was dissolved on July 31, 1936, it paid dividends from that source in the total amount of $7,311,342.96, leaving a balance of earned surplus at July 31, 1936, of $42,623.25.

It was the usual policy of the plaintiff to have its subsidiaries pay dividends to the parent each year based on the ability of the subsidiaries to pay, though this policy was not always observed as indicated in the succeeding finding.

17. The Canadian Company had undivided profits as of December 31, 1928, of $1,632,481.10; as of December 31, 1929, of $3,395,502.95; as of December 31, 1930, of $5,533,890.89; and as of December 31, 1931, of $7,557,803.73. For the years ending December 31, 1928 and 1929, the Canadian Company did not pay any dividends to plaintiff, its parent company, but in 1930 and 1931 paid cash dividends of $100,000 and $400,000, respectively.

The transaction of June 27, 1931, heretofore referred to, whereby the Canadian Company transferred certain assets to The Rohawa Company, as well as the transaction of June 11, 1930, when the plaintiff contributed 193,686 shares of its class A stock of the value of $9,442,066.45, and the transaction of February 29, 1932, when plaintiff contributed to the capital of The Rohawa Company $2,055,948.13 representing loans previously made, had for their purpose the building up of sufficient capital in the form of income-producing securities to enable The Rohawa Company to finance itself. The reason for having the transfer made

directly from the Canadian Company to The Rohawa Company in the transaction of June 27, 1931, instead of in the manner in which other funds and assets were transferred to the Rohawa Company was, first, that it was less expensive and easier mechanically to have it done in that way; and second, on the advice of counsel, it was expected that it would minimize the expenses in the form of taxes incident thereto.

THE SECOND CAUSE OF ACTION

18. In its income tax return for the taxable year 1931, which was filed as set out in finding 2, plaintiff signified its desire to have the benefits of section 131 of the revenue act of 1928 (45 Stat. 791) applied in the determination of its tax liability for that year.

19. At all times during the calendar year 1931 and prior thereto plaintiff owned all the authorized and outstanding stock of the Coca-Cola Company of Canada, Ltd., Toronto, Canada, a foreign corporation. Plaintiff and that subsidiary kept their books and filed their income-tax returns on the accrual basis of accounting. Their taxable year was the calendar year. During 1931 plaintiff received from the Coca-Cola Company of Canada, Ltd., dividends which were not deductible under section 23 (p) of the revenue act of 1928 as follows:

January 31, 1931	$100, 000. 00	(Canadian currency)
June 26, 1931	300, 000. 00	(Canadian currency)
Total	400, 000. 00	(Canadian currency)

These dividends of $400,000 were paid out of the accumulated profits of the Coca-Cola Company of Canada, Ltd., on which it paid Canadian income taxes both Dominion and provincial.

20. The dividends of $400,000 received by plaintiff from the Coca-Cola Company of Canada, Ltd., were included in plaintiff's Federal income-tax return for the year 1931 under Item 10 "Other income (including dividends received on stock of foreign corporations)." With that return and as a part thereof, plaintiff filed Treasury Department Form 1118 "CLAIM FOR CREDIT ON CORPORATION INCOME-TAX RE-

TURN FOR TAXES PAID OR ACCRUED TO A FOREIGN COUNTRY OR POSSESSION OF THE UNITED STATES," and the supporting evidence required by that form. On that form and in its Federal income-tax return, plaintiff claimed a credit of $40,462.49 under the provisions of section 131 (f) of the revenue act of 1928 for Canadian income taxes paid by the Coca-Cola Company of Canada, Ltd.

21. As shown in the findings relating to the first cause of action, the Commissioner, in reexamining plaintiff's consolidated income-tax return for the taxable year 1931, included in plaintiff's consolidated net income the sum of $5,109,608 representing an alleged dividend paid by the Coca-Cola Company of Canada, Ltd., to plaintiff, its sole stockholder. As a part of such redetermination, the Commissioner determined plaintiff's credit for foreign taxes deemed to have been paid by it under section 131 (f) of the revenue act of 1928 to be $519,640.28 as shown in the certificate of overassessment, a copy of which is attached to the petition marked "Exhibit 2" and incorporated herein by reference. In determining that credit, the Commissioner followed the method of computation provided for in principle in the "new" Form 1118 (revised), a copy of which is attached to the petition marked "Exhibit 4" and incorporated herein by reference.

22. Prior to 1930 the consistent practice of the Commissioner was to determine the credit allowable under section 131 (f) of the revenue act of 1928 and corresponding provisions of prior revenue acts in accordance with the method shown in the old Treasury Department Form 1118, Exhibit 5 of the petition, which is incorporated herein by reference.

Beginning in 1930, the consistent practice of the Commissioner was to determine the credit allowable under section 131 (f) of the revenue act of 1928 and corresponding provisions of other revenue acts in accordance with the method shown in a new Treasury Department Form 1118, a copy of which appears in the record as Joint Exhibit 2 and is made a part hereof by reference.

Form 1118 was again amended in 1938 (Exhibit 4 of the petition which is incorporated herein by reference) and the

Commissioner in his final computation of plaintiff's tax liability for 1931 followed the method outlined in that revised form in computing the foreign tax credit.

April 30, 1940, plaintiff filed a claim for refund of income taxes for 1931 in the amount of $56,300.24 and interest thereon of $20,942.15, a total of $77,242.39, and assigned as a ground therefor that its foreign tax credit had been erroneously computed by the Commissioner. The Commissioner rejected that claim of plaintiff and on May 24, 1940, notified plaintiff by registered mail of that action.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

The question is whether a transfer of assets by a foreign subsidiary to a domestic subsidiary of plaintiff in exchange for a stock issue of the domestic subsidiary followed by a dividend of such stock to plaintiff should, in the circumstances of this case, be treated as a taxable dividend to plaintiff or as a transfer of assets through reorganization and hence nontaxable under the provisions of section 112 (g) of the Revenue Act of 1928 (45 Stat. 791).

Plaintiff is a Delaware corporation which was organized in 1919 and which since that time has been engaged with its subsidiaries in the manufacturing, selling, bottling, and marketing of a syrup and soft drink under the trade-mark "Coca-Cola." In 1923 it organized the Coca-Cola Company of Canada, Ltd., hereinafter referred to as the "Canadian Company," and since that time has owned the entire stock of the Canadian Company. Prior to 1927, there were approximately 1,100 plants for the bottling of Coca-Cola throughout the United States, all of which with one or two exceptions were owned independently of plaintiff. Some of these bottling plants were not being efficiently and profitably operated. About 1926, plaintiff decided upon an expansion program under which it would acquire bottling plants located at strategic points throughout the United States and put them on a profitable operating basis as an example for other outside bottlers of Coca-Cola. In order to acquire and develop these bottling plants, plaintiff organized The Rohawa Company in 1926, all of its stock being owned by plaintiff.

The Rohawa Company was dependent on plaintiff for financing and it was necessary in order to enable that company to purchase and finance the bottling plants for plaintiff to make capital contributions to it from time to time. These contributions were very substantial, as shown from our findings. In furtherance of the major purpose for which it was formed, The Rohawa Company acquired eighteen bottling companies during the period from 1928 to 1933. Prior to 1934, these bottling companies had either operated at a loss or at most had shown only a small profit. On the other hand, over the period of its existence, plaintiff's operation as a whole had been very successful and the same was true of its foreign subsidiary, the Canadian Company, which had a surplus as of December 31, 1930, of over $5,500,000.

In 1931, when The Rohawa Company was still carrying out its policy of purchasing bottling companies and needed funds with which to finance its operation, plaintiff decided upon a plan through which assets having a value of $5,109,608 would be transferred from the Canadian Company to The Rohawa Company. This transaction was carried out in the following manner: The capital stock of The Rohawa Company which was then twenty shares was increased to fifty shares and on June 27, 1931, it issued the thirty additional shares to the Canadian Company for class A stock of plaintiff and United States bonds which had a total value at that time of $5,109,608. Immediately after the transfer the Canadian Company distributed the thirty shares of Rohawa stock to plaintiff without the surrender by plaintiff of any of the stock which it owned in the Canadian Company. All of these transactions were carried out in pursuance of a plan evolved by plaintiff which controlled all of the corporations in question. Thereafter, all of the corporations remained in existence and continued to carry on their normal functions as theretofore. None of these assets received by The Rohawa Company from the Canadian Company was distributed to plaintiff by dividends or otherwise in 1931.

The Commissioner of Internal Revenue determined that the amount of $5,109,608, representing the fair market value of the thirty shares of stock of the Rohawa Company which had

been distributed to plaintiff as shown above, constituted a taxable dividend from a foreign corporation and included it in plaintiff's taxable income for 1931. The contention of plaintiff is that the transaction by which this stock came to it was in pursuance of a plan of reorganization as defined by section 112 (i) (1) (B) of the revenue act of 1928, *supra*, and that since it was in pursuance of that plan of reorganization the distribution was nontaxable under section 112 (g) of the same act.

The revenue act of 1928 contains the following provisions with respect to reorganizations and the distribution of stock in pursuance of a plan of reorganization:

Sec. 112 (i)—

> (1) The term "reorganization" means * * * (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred. * * *
>
> (2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the total number of shares of all other classes of stock of another corporation.
>
> * * * * *
>
> Sec. 112 (g) *Distribution of stock on reorganization.*—If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

An examination of this transaction shows that it comes clearly within the wording of the definition of a reorganization as set out above in that the Canadian Company transferred a part of its assets to The Rohawa Company and immediately after the transaction the transferor (the Canadian Company), or its sole stockholder (plaintiff), was in control

of the transferee (The Rohawa Company), and that both The Rohawa Company and the Canadian Company were parties to the reorganization as defined by section 112 (i) (2) set out above. The transaction also comes within section 112 (g), *supra*, in that in pursuance of the same plan the Canadian Company distributed to its sole stockholder, plaintiff, the shares of stock of The Rohawa Company received by it without the surrender by plaintiff of any of the stock of the Canadian Company which it then owned. In form, therefore, it is clear that the transaction was a reorganization and in fact defendant admits that it falls "within the literal language of the reorganization provision." The position of the Government is that this so-called plan of reorganization was not a real plan but was conceived and carried out with the main purpose of tax avoidance and was not within the intent of the statute providing that such transactions do not result in taxable gain, or, as stated at one place in its brief, "The whole transaction was in reality a sham and it should be disregarded in determining plaintiff's tax liability."

We have, therefore, a situation where plaintiff has brought itself within the language of the statute which would make the transaction tax exempt, but where the defense is presented that it comes within the statute only because what was done was a mere sham or subterfuge designed for the purpose of tax avoidance. Admittedly, and we have so found as a fact, the transaction was carried out in this particular form in order to minimize the tax thereon. Where transactions are carried out in that manner, we should scrutinize the transaction closely in order to determine whether the statute has been strictly complied with. In other words, the oft-repeated principle "Men must turn square corners when they deal with the Government" is applicable. *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States*, 254 U. S. 141. To vary the illustration, the bridge has been crossed safely by plaintiff insofar as the letter of the statute is concerned and it remains only to determine whether it was a sham or a real crossing. The fact that the transaction was carried out in this particular manner in order to make its taxes as low as possible is not necessarily fatal to plaintiff's claim. *Helver-*

ing v. *Gregory*, 69 Fed. (2d) 809, affirmed in *Gregory* v. *Helvering*, 293 U. S. 465, and *Chisholm* v. *Commissioner*, 79 Fed. (2d) 14. The same cases, however, are authority for the proposition that the transactions must be real and, as the court said in *Helvering* v. *Gregory*, *supra*, must be "undertaken for reasons germane to the conduct of the venture in hand."

We are convinced and have found as a fact that the underlying purpose for the transaction in question was of a business nature, namely, the transfer of funds to The Rohawa Company from the Canadian Company for use by the former company in its business. No one of the three corporations involved in the plan of reorganization was in any sense a dummy corporation. Plaintiff had been in successful operation since 1919 and the Canadian Company had been a profitable subsidiary of plaintiff carrying on business in Canada since 1923. The Rohawa Company was formed in 1926 for the genuine business purpose of acquiring and operating bottling plants and had been engaged in operations of that character since that time. There were, therefore, no dummy corporations, such as were involved in *Gregory* v. *Helvering*, *supra*, which were set up for the purpose of the transaction and immediately liquidated when it was completed without performing any business functions. What was desired by plaintiff was to transfer surplus funds which were in the Canadian Company to The Rohawa Company and that was accomplished by the transaction. The transfer of funds to The Rohawa Company was nothing new since that had been done from time to time over the period of its existence.

It is true that in prior instances the transfers had been made directly from plaintiff to The Rohawa Company and that method could have been followed in this instance, that is, the Canadian Company could have first declared a dividend to plaintiff and then plaintiff in turn could have made the advances directly to The Rohawa Company. If carried out in that manner the dividend to plaintiff by the Canadian Company would have been taxable under section 22 (d) of the revenue act of 1928 and apparently a part of defendant's complaint is that plaintiff did not proceed in that manner.

The fact, however, that plaintiff chose a different course in carrying out a real transaction does not make the transaction any less real. Taxpayers are not required to carry out their transactions in a way that will produce the most tax for the Government, *Gregory* v. *Helvering*, *supra*. It is only when transactions which otherwise conform to the statute are unreal that they are condemned under the principles laid down in *Gregory* v. *Helvering*, *supra*. As the court said in *Chisholm* v. *Commissioner*, *supra*, in commenting on what was decided in the *Gregory case*: "That was the purpose [creating corporations in form only] which defeated their exemption, not the accompanying purpose to escape taxation; that purpose was legally neutral. Had they really meant to conduct a business by means of the two reorganized companies, they would have escaped whatever other aim they might have had, whether to avoid taxes or to regenerate the world." (See also *Commissioner of Internal Revenue* v. *Est. Anna V. Gilmore et al.*, decided August 28, 1942, C. C. H. par. 9648).

It would be difficult to find a case that would fall more clearly within the terms of the statute. Evidently it was the purpose of the Congress to permit through reorganization the shifting of funds or assets from one bona fide corporation to another under the same control in order to meet changing conditions and needs which might make such a transfer desirable. Such a transaction, under the conditions named in the statute, was to be treated not as income in fact but as a mere transfer of funds or assets already available.

Some argument is advanced by the defendant to the effect that the governing statute was a loophole provision which taxpayers were using to avoid taxes and that in recognition of this fact the provision was eliminated from the 1934 and later acts. Whatever may be the merits of that contention, we are governed in this instance by the 1928 act, and what the later acts may have contained is of no avail in this proceeding. Whatever loophole may have existed in the 1928 act which the taxpayer took advantage of in carrying out a genuine business transaction is something over which we have no control. We are not privileged to nullify a valid provision of law nor to question the wisdom of its enactment.

That it was eliminated in later years does not affect this transaction which was completed while the 1928 act was still in effect.

In view of the above considerations, we are of the opinion that the transaction in question was a nontaxable reorganization within the meaning of the statute and that accordingly the transfer of The Rohawa Company's stock by the Canadian Company to plaintiff was not subject to tax.

For a second cause of action plaintiff states that the Commissioner of Internal Revenue improperly computed plaintiff's foreign tax credit under section 131 (f) of the Revenue Act of 1928. However, prior to the submission of the case, the Supreme Court affirmed the decision of this court in *American Chicle Co.* v. *United States*, 94 C. Cls. 699, and counsel for plaintiff, in his oral argument, conceded that that decision (*American Chicle Co.* v. *United States*, 316 U. S. 450) required an affirmance of the commissioner's action on this point.

Entry of judgment in favor of plaintiff will be withheld pending the filing of a stipulation showing the amount due in accordance with this opinion or, in the event the parties are unable to agree upon the amount, the filing of a report by a commissioner of the court.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

In accordance with the opinion of the court, and upon the filing of a stipulation by the parties stating "that for the year 1931 there is an overpayment of income tax in the amount of $133,898.13 and an overpayment of interest in the amount of $49,806.44, making a total of $183,704.57," and upon motion of plaintiff for judgment, the court on January 4, 1943, entered judgment for the plaintiff in said sum of $183,704.57 with interest thereon from the date of payment, June 8, 1938, according to law.

THE ROHAWA COMPANY BALANCE SHEETS

	March 1, 1927 (opening)	December 31, 1927	December 31, 1928	December 31, 1929	December 31, 1930	December 31, 1931	December 31, 1932	December 31, 1933	December 31, 1934	December 31, 1935	July 31, 1936 (Before liquidation)
ASSETS											
Current:											
Bank Accounts	$1,000,000.00	$38,533.38	$24,097.70	$61,967.52	$84,775.55	$11,786.29	$65,131.53	$127,869.81	$275,527.58	$138,803.75	
Notes Receivable		1,000,000.00	1,600,000.00								
Investment in The CC Co. Class "A" Stock					9,442,066.45	15,414,926.32	16,060,578.42	16,129,363.42	6,380,903.92		
Investment in The CC Co. Common Stock								374,711.72	1,319,711.72		
Other assets:											
Miscellaneous Notes & Accts. Receivable		101,336.72	73,656.00	11,336.17	24,000.00	24,000.00	43,600.00	59,418.89	325,921.13	500.00	$500.00
Inter-company accounts receivable:											
The Coca-Cola Bot. Co. of Calif.			80,000.00	96,000.00	120,000.00	125,000.00	135,000.00	87,790.03	70,290.03		
Coca-Cola Bottling Co. of Utah			16,000.00	24,000.00	34,900.00	49,900.00	49,900.00	32,900.00	28,900.00	31,900.00	31,900.00
Coca-Cola Bottling Co. of R. I.			7,057.64	12,057.64	24,557.64	20,057.64	53,657.64	111,966.43	118,466.43	114,466.43	114,466.43
The Coca-Cola Company			24,053.19	145,213.84				616,378.59	490,617.28	[illegible]	104,798.73
Coca-Cola Bottling Co. of Boston				37,593.00	92,590.00	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
The Coca-Cola Export Corp.					385.75						
Coca-Cola Bot. Co. of Portland (Oregon)						15,000.00	24,000.00	2,500.00	13,000.00	13,000.00	13,000.00
Coca-Cola Bottling Co. of Seattle (Wash.)						35,000.00	48,000.00	78,000.00	113,206.00	123,165.00	123,165.00
Coca-Cola Bottling Co., Atlantic City						12,500.00	22,000.00	30,000.00	21,500.00		15,000.00
Atlanta Baseball Corporation							20,000.00				
New England Coca-Cola Bottling Co.								117,519.87	117,450.70	82,450.70	82,450.70
Coca-Cola Bottling Co. of Conn.								360,132.17	324,619.31	314,619.31	314,619.31
Wone Realty Corporation										300,000.00	300,000.00
Total Inter-Co. Accts. Receivable			127,108.83	327,071.48	272,463.39	419,457.64	513,457.64	1,638,188.09	1,532,949.83	1,313,001.44	1,447,800.19
Inter-company investments:											
The Coca-Cola Bot. Co. of Calif.			100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00
Coca-Cola Bottling Co. of Utah			77,091.22	77,091.22	77,091.22	77,091.22	77,091.22	77,091.22	77,091.22	77,091.22	77,091.22
Coca-Cola Bottling Co. of R. I.			50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00	50,000.00
Coca-Cola Bottling Co. of Boston				10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
Coca-Cola Bottling Co. of Enid				89,500.00	89,500.00	89,500.00	89,500.00	89,500.00	89,500.00	89,500.00	89,500.00
Coca-Cola Bottling Co. of Pittsburgh (Pa.)				1,380,000.00	1,380,000.00	1,380,000.00	1,380,000.00	1,580,000.00	1,524,366.55	1,438,017.89	1,438,017.89
Coca-Cola Bottling Co. of Baltimore					1,340,561.71	1,340,561.71	1,340,561.71	1,340,561.71	1,237,866.22	1,193,223.88	1,193,223.88
The Coca-Cola Export Corp.					702,600.00	702,600.00	702,600.00				
Coca-Cola Bottling Co. of Portland (Oregon)						135,000.00	135,000.00	176,709.97	176,709.97	176,709.97	176,709.97
Coca-Cola Bottling Co. of Seattle (Wash.)						125,500.00	125,500.00	125,500.00	125,500.00	125,500.00	125,500.00
Coca-Cola Bottling Co., Atlantic City						350,000.00	350,000.00	350,000.00	350,000.00	226,500.00	226,500.00
Coca-Cola Bottling Co. of Columbus (Ohio)						1,057,375.00	1,172,375.00	1,172,375.00	1,131,096.21	1,104,464.82	1,104,464.82
Youngstown Coca-Cola Bottling Co.						115,000.00					
Atlanta Baseball Corp.							27,814.84				
Coca-Cola Bot. Works, Inc., Bethlehem							200,000.00				
New England Coca-Cola Bottling Co.								250,000.00	250,000.00	250,000.00	250,000.00
The Coca-Cola Bot. Co., Atlanta								4,946,223.97	4,946,223.97	4,946,223.97	4,946,223.97
Coca-Cola Bottling Co. of Conn.								50,000.00	50,000.00	50,000.00	50,000.00
Galveston Coca-Cola Bottling Co.								75,000.00			
Total Bottling Plant Investment			227,091.22	1,706,591.22	3,749,652.93	5,532,627.93	5,760,642.77	10,392,961.87	10,118,354.14	9,937,231.75	9,937,231.75
Permanent assets:											
Machinery & Equipment			28,924.23	31,963.35	30,876.08	30,876.08	30,876.08	30,876.08	30,876.08		
Furniture & Fixtures				48.60	48.60	48.60	48.60	48.60	48.60		
Subtotal			28,924.23	32,011.95	30,924.68	30,924.68	30,924.68	30,924.68	30,924.68		
Reserve for Depreciation			2,048.84	5,045.60	8,094.76	11,188.36	14,281.96	17,375.56	20,469.16		
			26,875.39	26,966.35	22,829.92	19,736.32	16,642.72	13,549.12	10,455.52		
Deferred charges:											
Unexpired Insurance & Prepaid Expense				722.36	722.36	73.36	73.08	73.36	796.72	1,225.00	
	1,000,000.00	1,139,870.10	2,077,824.14	2,135,255.10	13,596,810.60	21,422,807.86	22,480,126.16	28,734,136.31	19,944,619.56	11,388,761.94	11,385,531.94
LIABILITIES											
Current:											
Accounts Payable		216.67				2,030.00	9,633.00	2,030.00	1,795.10	4,200.00	1,772.00
Inter-company accounts:											
The Coca-Cola Company		110,997.19			727,811.27	2,055,948.13	91,617.67				
Coca-Cola Bottling Co. of Columbus (Ohio)						75,000.00		107,500.00			
Coca-Cola Bottling Co. of Pittsburgh (Pa.)						69,889.71		110,000.00			
Coca-Cola Bottling Co. of Baltimore						42,122.70	23,533.25	145,904.33			
Coca-Cola Company											144.75
		110,997.19			727,811.27	2,242,960.54	115,150.92	363,404.33			144.75
Reserve for Federal Income Tax									5,200.00	76.39	276.39
Capital:											
Common Stock	1,000.00	1,000.00	1,000.00	1,000.00	703,800.00	5,714,706.50	5,714,706.50	5,714,956.50	5,714,956.50	5,714,956.50	5,714,956.50
Capital Surplus	999,000.00	999,000.00	1,999,000.00	1,999,000.00	11,441,066.45	11,441,065.43	13,497,014.38	19,665,536.20	13,094,239.58	5,625,756.05	5,625,756.05
Earned Surplus		28,656.24	77,824.14	135,255.10	724,132.88	2,022,044.37	3,143,621.16	3,048,239.28	1,128,428.38	43,773.00	42,622.25
	1,000,000.00	1,139,870.10	2,077,824.14	2,135,255.10	13,596,810.60	21,422,807.86	22,480,126.16	28,734,136.31	19,944,619.56	11,388,761.94	11,385,531.94



EARL S. SCHOFIELD v. THE UNITED STATES

[No. 45293. Decided October 5, 1942]

On the Proofs

Pay and allowances; "flying officers."—Observer not "qualified as a pilot" in the meaning of the Act of July 2, 1926 (44 Stat. 780, 781.)

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the brief.

Mr. S. R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Miss Stella Akin* was on the brief.

The court made special findings of fact as follows:

1. The plaintiff, Earl S. Schofield, at all times after November 22, 1921 was a commissioned officer in the Air Corps (known prior to 1926 as the Air Service), United States Army, on active duty.

Under the provisions of the act of July 2, 1926, he was assigned to duty, effective April 20, 1935, as intelligence and operations officer, 21st Airship Group, with the rank of Major (temporary) for the period of that assignment. His temporary rank as Major was terminated on June 16, 1936, and he reverted to the grade of Captain, Air Corps, on June 17, 1936.

Under the provisions of the act of Congress approved June 16, 1936, he again attained the rank of Major (temporary), Air Corps, by appointment on June 22, 1936, with rank from June 16, 1936, and continued to serve under the temporary commission until October 1, 1936, when the commission was vacated by reason of his permanent promotion on that date to the rank of Major, Air Corps. He attained the rank of Lieutenant Colonel (temporary), Air Corps, by appointment on March 11, 1940, with rank from March 1, 1940, and continued to serve under such temporary commission until October 9, 1940, when the commission was vacated by reason

of his permanent promotion on that date to the rank of Lieutenant Colonel, Air Corps. He now holds the rank of Lieutenant Colonel, Air Corps.

2. In 1921 plaintiff attended the United States Army Balloon School at Ross Field, California, at which time he received training as a balloon observer. Some of the subjects in which plaintiff had to qualify and become proficient were meteorology, gas aerodynamics, instruments, theory of ballooning and aerostatics, free ballooning and captive ballooning, and piloting of free balloons and captive balloons.

3. Plaintiff having qualified by completing the required tests, received a rating as balloon observer under the following personnel orders, dated November 22, 1921:

> 1. Each of the following named officers having completed the required tests, is, under the provisions of Paragraph 1584½, Army Regulations, rated as Balloon Observer, effective this date:
>
> * * * * *
>
> 1st Lt. EARL S. SCHOFIELD, *Air Service.*
>
> * * * * *
>
> By direction of the Chief of Air Service.
>
> J. W. SIMONS, Jr.,
> *Major, Air Service,*
> *Acting Administrative Executive.*

This rating as balloon observer has never been revoked.

At the time plaintiff took this training and received the rating of balloon observer there was no rating of "balloon pilot."

4. In 1922 and 1923 plaintiff took the balloon and airship training course at Scott Field, Illinois, with the purpose of qualifying as an airship pilot. This was the only time he attended an airship school for the purpose of qualifying as a pilot. Due to illness he did not complete a sufficient amount of the course to qualify as an airship pilot. The plaintiff has not qualified as an airship pilot.

5. Under date of July 22, 1922 Personnel Orders 146 were issued, which included the following:

> * * * * *
>
> 3. Pursuant to General Orders No. 30, War Department, 1922, the detail to duty involving flying, effective

July 1, 1922, of the following named officers commissioned in, or detailed to the Air Service, who are qualified aircraft observers and who were on duty requiring regular and frequent participation in aerial flights on June 30, 1922, and have been on such duty since that date, is hereby confirmed, an emergency having existed that prevented the issuance of this order on that date (Par. 3, Executive Order).

* * * * *

Capt. EARL S. SCHOFIELD, A. S.

* * * * *

By direction of the Chief of Air Service.

W. H. FRANK,
Major, Air Service, Executive.

6. On December 6, 1922, Personnel Orders No. 248 were issued, Section 1 of which related to plaintiff and is as follows:

1. Pursuant to Section 2, General Order No. 46, War Department, 1922, as published in Executive Order of October 30, 1922, amending Executive Order of July 1, 1922, as published in General Order No. 30, War Department, 1922, the detail to duty involving flying, effective November 10, 1922, of the following named officers commissioned in, or detailed to the Air Service, who are fit for duty involving flying, and who were on duty requiring regular and frequent participation in aerial flights on June 30, 1922, and have been on such duty since that date, is hereby confirmed, an emergency having existed that prevented the issuance of this order on that date. All orders issued in conflict with above are hereby revoked.

The detail to duty involving flying constitutes participation in one or more of the following: Routine test flights and test flights of new or overhauled aircraft or their power plants, instruments, equipment or accessories; prescribed training of student airplane pilots, student observers or members of aircraft crews; inspection of the adequacy of flight training material; the efficiency of instructing personnel; familiarizing pilots or other flying personnel with the operation of types of aircraft, power plants, instruments or equipment with which they are inexperienced; experimental development of aircraft or parts of aircraft or for experimental development of aviation instruments, equipment or accessories, training for aircraft gunnery and bomb-

ing exercises; administrative or inspection purposes in connection with air work or for expediting the movements of personnel; material or mail; training of reserve flying personnel flights duly authorized for the purpose of cooperation with other Government Departments, ferrying aircraft, aerial scouting, reconnaissance, convoy, patrol flights or training for the performance of any of these duties; aerial photography, mapping, pigeon training; tactical maneuvers and for the study and observation of the physical and psychological condition of flying personnel:

* * * * *

1st Lt. EARL S. SCHOFIELD, A. S.

* * * * *

By order of the Chief of Air Service:

W. H. FRANK, *Executive.*

7. During the period from April 20, 1935 to November 22, 1940, inclusive, plaintiff was on duty requiring him to participate regularly and frequently in aerial flights, and by orders of competent authority performed the flights prescribed in the Executive Order of June 27, 1932, and fulfilled the legal requirements to entitle him to draw flying pay for that period. During that time he flew as an observer in lighter-than-air aircraft until some time in June 1936, and thereafter as an observer in heavier-than-air aircraft.

8. On December 2, 1935 plaintiff was advised by the Adjutant General as follows:

> 1. Upon the approved recommendation of the Flying Proficiency Board, you have been placed in Classification 5*a* (2) (*b*), Circular 69, War Department, 1935, which reads as follows:
>
> "Those capable and qualified for nonpiloting duty in the Air Corps. This nonpiloting group will include those deemed qualified for such duties as high command and staffs in the Air Corps, combat duties other than piloting, and senior officers of the engineer group and procurement-supply group of the Air Corps. They will be required to continue their aerial experience and fulfill the legal requirements to draw flying pay."
>
> 2. In this connection, your attention is invited to paragraph 2*a* (4) (*d*), Circular 69, War Department, 1935, which requires you to comply with the provisions of that circular as to minimum number of hours in the air and types of missions as outlined therein.

3. You are advised that you will be reclassified by the Flying Proficiency Board at the close of the current fiscal year, based upon a careful examination of your flying records for the period in question.

By order of the Secretary of War.

9. For the period of his claim, namely, from April 20, 1935 to November 22, 1940, plaintiff was paid increased flying pay as follows: From April 20, 1935 to June 30, 1940, inclusive, he was allowed flying pay at the rate of $1,440 per annum, and for the period from July 1 to November 22, 1940, inclusive, he received flying pay at the rate of $720 per annum. He actually received as flying pay for the period April 20, 1935 to January 31, 1936, inclusive, 50 percent of his base and longevity pay, but he was required to and did refund to the United States the difference between the rate of $1,440 per annum and an increase of 50 percent of his pay for that period. He was refused increased flying pay of 50 percent as provided in Section 13a of the act of June 4, 1920 (41 Stat. 759, 768), as amended by the act of July 2, 1926 (44 Stat. 780, 781), on the ground that he never had received the rating as a pilot of service types of aircraft.

10. Plaintiff claims he is entitled to an increase of 50 percent of his base and longevity pay for the entire period stated as provided by the act of July 2, 1926, *supra*, amending section 13a of the act of June 4, 1920.

If plaintiff is entitled to an increase of 50 percent of his base and longevity pay by reason of making aerial flights during the period from April 20, 1935 to July 31, 1940, the latest available pay roll on which he was paid flying pay, there would be due him as increased flying pay for that period the sum of $6,398.11. Plaintiff claims increased flying pay at that rate for the period from April 20, 1935 to November 22, 1940, inclusive.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff in this case sues for the difference between fifty percent of his base and longevity pay from April 20, 1935 to November 22, 1930, allowed by law to "flying officers,"

and the amount he received as a nonflying officer. He claims that during this period he was a flying officer as defined by the applicable statutes. These statutes provided for additional pay for a flying officer of 50 percent of their base and longevity pay when they were required to participate regularly and frequently in aerial flights, but they limited the additional compensation to nonflying officers for regular and frequent participation in aerial flights to $1,440 per annum for a portion of the period, and to $720 per annum for the balance of the period. Plaintiff has been paid the extra pay provided for nonflying officers, and sues for the increased allowance to which he claims he is entitled as a flying officer. It is conceded that plaintiff did participate regularly and frequently in aerial flights sufficiently to entitle him to the compensation he seeks, if he was a "flying officer."

Section 2 of the Act of July 2, 1926 (44 Stat. 780, 781) defines a flying officer as follows:

> * * * Wherever used in this Act a flying officer in time of peace is defined as one who has received an aeronautical rating as a pilot of service types of aircraft: *Provided*, That all officers of the Air Corps now holding any rating as a pilot shall be considered as flying officers within the meaning of this Act * * *.

Under this Act plaintiff is not entitled to recover, because it is admitted he has never received an aeronautical rating as a pilot of service types of aircraft. In 1921 he was rated as a balloon observer. In the years 1922 to 1923 he attended an airship school with a view of qualifying as an airship pilot, but he was unable to complete the course on account of sickness, and did not receive such a rating.

However, on June 16, 1936 Congress passed an Act (49 Stat. 1524, 1525), section 3 of which amended the above quoted provision of section 2 of the Act of July 2, 1926, by changing the definition of a flying officer to read as follows:

> * * * A flying officer in time of peace is defined as one who has received an aeronautical rating as a pilot of service types of aircraft or one who has received an aeronautical rating as an aircraft observer: *Provided*, That in time of peace no one may be rated as an aircraft observer unless he has previously qualified as a pilot. * * *

Plaintiff claims that because he had been rated as a balloon observer, and since, in order to be rated as a balloon observer, one must be qualified to pilot a free balloon, he comes within the provisions of the Act of 1936. We do not think this Act is susceptible of such a construction.

When plaintiff was rated as a balloon observer, there was no such rating as a balloon pilot; in fact, piloting a balloon consists of nothing more than releasing ropes or weights in order to rise, and releasing gas in order to descend. It is possible to exercise but little control over the direction of a spherical balloon unequipped with a motor or other necessary means of navigation. This can be done only by taking advantage of air currents, so far as this is possible by raising or lowering the height of the balloon. The necessary training for raising or lowering a balloon was but a small part of the training of a balloon observer, as is shown by plaintiff's testimony as to the course of instruction received by him to qualify him to secure the rating of a balloon observer. He states:

> The course of instruction consisted of organization and administration, theory of ballooning and aerostatics, free ballooning and captive ballooning, instruments, balloon winches, machine guns, gas aero-dynamics, meteorology, telephony, radio, pigeons, laison [liaison] artillery, cooperation with artillery, cooperation with infantry, general observation and surveyance, [sic] chart room, method of orientation, method of observation, perspective and panoramic drawing, aerial photography. * * *
>
> Learning sector, orientation, locating active hostile batteries, salvo shoots—
>
> *   *   *   *   *
>
> * * * Artillery regelage and barrage, and the rest of it is course map preparations for shoots, lectures * * *.

When the Act of 1936 was passed enlarging the meaning of a flying officer by including not only persons rated as pilots but also persons rated as observers, with the proviso that an observer must have been qualified previously as a pilot, we think Congress had in mind those observers who had previously been rated as pilots, but who, on account of physical disability, were no longer able to perform the duties

of a pilot, but who were still able to perform the duties of an observer. Cf. *Holland* v. *United States*, 88 C. Cls. 341. Plaintiff has never been rated as a pilot.

When the Act uses the expression "qualified as a pilot," we think it refers to one who has passed the required course for a rating as a pilot. It is conceded that plaintiff has never passed any course entitling him to a rating of a pilot. The only course he has passed is a course to qualify him as an observer. He was unable to complete his course to qualify as a pilot.

The report of the Committee on Military Affairs of the House indicates that this was the intent of Congress. On page 3 of this report (H. R. No. 2359, 74th Cong., 2d sess.) it is said:

> Section 3 proposes a clarification of the term "flying officer" as used in the act of July 2, 1926. At present the legal interpretation of the language used in the Act, defines a "flying officer" as an active pilot only. Therefore, those pilots who have become disqualified for duty as active pilots because of minor physical defects but who are still capable of performing flying duty such as commanders, navigators, bombers, gunners, or observers are by law classified as nonflying officers.
>
> The effects of existing legislation are harmful in that selected, highly trained officers are denied the opportunity to command flying units of the Air Corps only because they cannot meet the rigid physical standards required of active combat pilots. Modern developments in aircraft and its employment indicate clearly that in command positions it is most desirable to relieve the commander from the actual task of piloting the airplane. The committee believes that Air Corps officers who have had long experience in flying as a pilot and who have acquired extended military education are the logical commanders of air units. It seems contrary to the dictates of common sense to deprive the Air Corps of the services of these highly trained officers during the period when they are most valuable. The committee also believes that an Air Corps officer should be assured the opportunity to command air units when he grows older and more experienced.
>
> * * * * *
>
> In brief, the proposed bill guarantees at all times a command and control personnel that has the back-

ground of piloting experience, thus assuring an active, flying organization wherein the long experience of older pilots is not discarded but, on the other hand, used to the maximum extent.

* * * * *

Plaintiff has never qualified or been rated as a pilot of service types of aircraft and, therefore, although an observer, is not entitled to the benefits of the Act of June 16, 1936, *supra.*

It results that plaintiff's petition must be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY v. THE UNITED STATES

[No. 45326. Decided October 5, 1942]

On the Proofs

Railroad rates; tariffs are based on geographical locations of stations, not on index numbers.—Where defendant shipped certain freight over plaintiff's railway from El Paso, Texas, to Artesia, Carlsbad, Fort Sumner, Mountainair, and Roswell, all destinations being in the State of New Mexico; and where upon submission of bills for said shipment, defendant refused payment of the bills as submitted and instead paid lesser amounts, based on a supplementary tariff in which it was stated that the rates named therein between El Paso, Texas, and Hurley, New Mexico, would apply as maximum on shipments of similar character to New Mexico points, Rincon to Faywood, inclusive (Index Nos. 3818 to 4068, inclusive); and where the "index" numbers of the stations Artesia, Carlsbad, Fort Sumner, Mountainair and Roswell, were intermediate between the index numbers of Rincon and Faywood, but the stations named, Artesia, Carlsbad, Fort Sumner, Mountainair and Roswell, were not geographically intermediate between Rincon and Faywood; it is *held* that the lower rates in said supplement did not apply to the shipments involved in the instant suit and plaintiff is accordingly entitled to recover.

Same.—Railroad rates are based on stations and their geographical location rather than on successive indexes in an artificial numerical series.

The Reporter's statement of the case:

Mr. Lawrence Cake for the plaintiff.

Mr. Rawlings Ragland, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Louis Mehlinger* was on the brief.

The court made special findings of fact as follows upon the stipulation of the parties:

1. Plaintiff is a common carrier by railway of freight and passengers for hire, its tariff charges for such services being duly published and filed with the Interstate Commerce Commission as required by law.

2. In March, April, and May, 1939, the United States made certain shipments of freight over plaintiff's railway lines from El Paso, Texas, to Artesia, Carlsbad, Ft. Sumner, Mountainair, and Roswell, New Mexico, on bills of lading issued by the War Department. The shipments were carried and delivered by plaintiff at the destinations named in accordance with the terms of the bills of lading.

3. Thereafter plaintiff presented to disbursing officers of the War Department its bills for said transportation services computed on the basis of rates between the points named, published in its tariffs Nos. 15200–A (I. C. C. No. 13058), 14230–D (I. C. C. No. 12829), and 15500–A (I. C. C. No. 12888), but without regard to the rates published in section 1–A, page 7, of Supplement No. 4 to the last named tariff.

Copies of the pertinent pages of plaintiff's tariff No. 15500–A (I. C. C. No. 12888) and of Supplement No. 4 thereto are attached to the agreed statement of facts and made a part hereof by reference.

4. Disbursing officers of the War Department reduced plaintiff's bills as presented and paid the transportation charges on the basis of rates published in section 1–A, page 7, of Supplement No. 4 to plaintiff's tariff No. 15500-

A (I. C. C. No. 12888) as applying between El Paso, Texas, and Hurley, New Mexico, and in effect at the time the shipments were made.

Thereafter plaintiff presented to War Department disbursing officers supplemental bills claiming the amounts not paid, but they were returned with a letter dated December 8, 1939, with a request that they be withdrawn for the reasons stated therein as follows:

> Under the application of Section 1-a of Supplement No. 4 to A., T. & S. F. Tariff 15500-A the following is found, "Classes 1, 2, 3 and 4 between El Paso, Texas, and Hurley, N. M., published in Section 1-A will apply as maximum on shipments of similar character at New Mexico points Rincon to Faywood, incl. (Index Nos. 3818 to 4068, incl.)" Reference to the geographical list of stations on Pages 4 and 5 of the tariff clearly shows that the index number of each destination involved in the quoted supplemental bills is included within index numbers 3818 to 4068, and therefore rates to these points are subject to the rates published to Hurley, N. M. as maximum.
>
> Furthermore, the application of Section 1a indicates by reference that the establishment of the maximum rates was "To meet Motor Truck Competition" and it is, therefore, apparent that such competition was the underlying reason for the publication of these rates. As the extent of motortruck competition is an indeterminate factor, it does not appear that the application of Hurley rates to such points as Carlsbad, Roswell, etc., constitutes a strained or unnatural interpretation of the tariff.

In a letter dated December 26, 1939, to the General Accounting Office plaintiff protested the action of the War Department in paying its bills in reduced amounts with particular reference to bill No. 8865—items 1 and 2 of Exhibit A to the petition—on the ground that there was no basis for the application of the rates published in section 1-A, page 7, of Supplement No. 4 to its tariff No. 15500-A. By settlement dated April 13, 1940, the General Accounting Office disallowed plaintiff's claim for additional payment on its bill No. 8865 for the same reasons as those quoted from the War Department's letter of December 8,

1939. Plaintiff on October 5, 1940, requested a review of the settlement and was advised on October 28, 1940, that Supplement No. 4 to plaintiff's tariff No. 15500-A authorized the application of the El Paso, Texas, to Hurley, New Mexico, rates at stations Artesia, Carlsbad, Fort Sumner, Mountainair, and Roswell, New Mexico.

5. Supplement No. 4 to plaintiff's tariff No. 15500-A provided in Section 1-A under the heading "Application" as follows:

> Classes 1, 2, 3 and 4 BETWEEN El Paso, Tex., and Hurley, N. M., published in Section 1-A will apply as maximum on shipments of similar character at New Mexico points Rincon to Faywood, incl. (Index Nos. 3818 to 4068, incl.).

The rates published in Supplement No. 4, I. C. C. No. 12888, as indicated on page 8 thereof by special reference, were reduced to meet motortruck transportation.

6. The index numbers of Artesia, Carlsbad, Fort Sumner, Mountainair and Roswell, New Mexico, as shown in the list of stations and index numbers in plaintiff's tariff No. 15500-A, are as follows:

Artesia	4002
Carlsbad	4016
Ft. Sumner	3928
Mountainair	3884
Roswell	3982

The index number of Rincon is 3818 and the index number of Faywood is 4068.

7. A map showing plaintiff's lines in New Mexico and all junction points and intermediate local stations with index numbers noted, including the several stations above named, is attached to the agreed statement of facts and made part of these findings by reference.

8. Attached to the agreed statement of facts and made a part hereof by reference is a tabulation which shows with respect to each shipment the number of the freight bill and the bill of lading, origin and destination, date of shipment, amount claimed, amount paid, difference claimed, correct charges on basis now claimed by plaintiff, and correct charges on basis claimed by defendant.

If the rates published in Supplement No. 4 to plaintiff's tariff No. 15500–A, I. C. C. No. 12888, are found to be applicable, the balance due plaintiff on said shipments is $57.63.

If, however, it is found that the rates in said Supplement No. 4 are not applicable, there is due plaintiff the sum of $1,234.94.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case comes to the court on a stipulation of facts by the parties.

It appears therefrom that in March, April, and May of 1939 the defendant shipped certain freight over plaintiff's railway from El Paso, Texas, to Artesia, Carlsbad, Fort Sumner, Mountainair and Roswell, all destinations being in the State of New Mexico.

Upon completion of the transportation plaintiff presented its bills therefor to the defendant for payment. Defendant's officers refused payment of the bills in full and instead paid lesser amounts.

These underpayments are the difference between higher charges as calculated in plaintiffs' tariffs Nos. 15200–A (I. C. C. No. 13058), 14230–D (I. C. C. No. 12829), and 15500–A (I. C. C. No. 12888), without resort to supplement No. 4 of tariff No. 15500–A, and lower charges calculated by a resort to such supplement. The supplement published certain maximum rates which could not be exceeded.

In making the underpayments defendant's officers relied on a paragraph in supplement No. 4 that the rates named therein (used by defendant's officers) between El Paso, Texas, and Hurley, N. M., would apply as maximum on shipments of similar character at New Mexico points, Rincon to Faywood, inclusive (index Nos. 3818 to 4068, inclusive).

Rincon and Faywood are between El Paso and Hurley and it is clear enough that rates named in supplement No. 4 from El Paso to Hurley would be the maximum that could be applied on a shipment of a similar charactèr from

El Paso to Faywood or to any station between Rincon and Faywood, notwithstanding any rate that might be named in the principal tariff, which No. 4 supplemented. Supplement No. 4 indicates that these maxima were published "To meet Motor-Truck competition."

Rincon is north of El Paso and from Rincon there runs westwardly from the main line a branch on which are located Hurley and Faywood.

This branch line is confined to the southwestern corner of New Mexico.

None of the destinations of the Government shipments here involved were on this branch line, but far distant therefrom, in the central, eastern, and southeastern parts of the State. Shipments thereto from El Paso would not pass over any part of the branch line and none of the destinations were between Rincon and Faywood.

In its tariff plaintiff gives its stations serial index numbers. As to the stations herein referred to those numbers, shown in the tariff as "index" numbers, are as follows:

	Index
El Paso	3854
Artesia	4002
Carlsbad	4016
Ft. Sumner	3928
Mountainair	3884
Roswell	3982
Hurley	4074
Rincon	3818
Faywood	4068

It will be observed that the index numbers of the destinations Artesia, Carlsbad, Ft. Sumner, Mountainair, and Roswell, are, as far as numerical order is concerned, between the index numbers of Rincon and Faywood. The index numbers are serially intermediate, but the stations themselves are not intermediate.

It is obvious that rates are based on stations and their geographical location rather than on successive indexes in an artificial numerical series.

Physical situations may not be altogether neglected. The tariff itself does not do so and furnishes a *geographical* list

of stations from which it appears that none of the destinations we are concerned with here are on the branch line extending westwardly from Rincon. The first branch line station (Hatch, No. 4044) starts with a high number, Faywood is No. 4068, and Hurley is No. 4074. It is inconceivable that either rate-makers or interpreters of tariffs do without maps. There is no station between Rincon, whose index number is 3818, and the first station therefrom on the branch line, Hatch, whose index number is 4044, and to lift and place the remote stations of Artesia, Carlsbad, Ft. Sumner, Mountainair, and Roswell between them merely because of their intermediate serial numbers, cannot be accepted as proper tariff construction in the situation we have here. Such construction was manifestly never contemplated in the publication and filing of the tariff.

The note relied upon by the defendant is in Section 1-A of Supplement No. 4 and, omitting marginal reference marks, is in words and figures as follows:

APPLICATION

> Classes 1, 2, 3, and 4 BETWEEN El Paso, Tex., and Hurley, N. M., published in Section 1-A will apply as maximum on shipments of similar character at New Mexico points Rincon to Faywood, incl. (Index Nos. 3818 to 4068, incl.).

The index number of Rincon is 3818, that of Faywood 4068, and that is all the parenthetical matter can be taken to indicate. It is simply another way of saying: "Rincon (3818) to Faywood (4068), inclusive."

It is agreed that, in the event rates in Supplement No. 4 are not applicable, there is due plaintiff $1,234.94.

We are of the opinion that the rates in Supplement No. 4 are not applicable. Judgment will be entered for the plaintiff in the sum of $1,234.94. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

WILLIAM D. WHEELER v. THE UNITED STATES

[No. 45349. Decided October 5, 1942]

On the Proofs

Pay and allowances; "flying officers."—Petition dismissed on the authority of *Earl S. Schofield* v. *The United States*, *ante*, p. 263.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the briefs.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Carl Eardley* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff, William D. Wheeler, is a commissioned officer on active duty in the Air Corps (previously known as the "Air Service" and "Aviation Section of the Signal Corps"). He was appointed 2nd Lieutenant of Infantry, National Army, August 15, 1917. January 11, 1918 he was appointed 2nd Lieutenant, Signal Section, Officers' Reserve Corps, and March 5, 1918, 2nd Lieutenant, Aviation Section, Signal Officers' Reserve Corps, both of which appointments ranked from August 15, 1917. He was promoted to 1st Lieutenant, Aviation Section, Signal Officers' Reserve Corps, April 1, 1918, which he accepted April 6, 1918. He vacated his emergency commission September 18, 1920 by accepting on that date an appointment as 1st Lieutenant, Air Service, Regular Army, to rank from July 1, 1920. He was promoted to Captain March 14, 1921, to rank from July 1, 1920; to Major August 1, 1935; to Lieutenant Colonel (temporary) September 2, 1938, which he accepted September 3, 1938; and to Lieutenant Colonel September 9, 1940, to rank from August 18, 1940. His active commissioned service has been continuous since August 15, 1917.

2. In 1922, after completing the required course in aviation and observation at an Air Corps school then operated in Arcadia, California, plaintiff was rated a balloon observer

and, after proper training, he also received the rating of airplane observer. These ratings have never been revoked. His course of training as balloon observer included ballooning, captive ballooning and free ballooning, including the piloting of free balloons. Having passed the required tests, he was licensed as a spherical balloon pilot by the Federation Internationale Aeronautique of France, and in his capacity as an Army officer, and pursuant to orders of competent authority, plaintiff has actually performed the duties of a pilot of free balloons.

3. The War Department by Personnel Orders No. 178 rated plaintiff as airplane observer, effective August 1, 1927, the pertinent parts of those orders reading as follows:

> 6. Capt. William D. Wheeler, Air Corps, having satisfactorily completed the required course of instruction in observation at the Air Corps Advanced Flying School, is, under the provisions of section 2, General Orders 19, War Department, 1925, rated Airplane Observer, effective August 1, 1927.
>
> * * * * *
>
> By order of the Chief of Air Corps.

4. By paragraph 7 of Personnel Orders No. 178, War Department, dated August 1, 1927, plaintiff was detailed to duty involving flying, requiring regular and frequent participation in aerial flights, which paragraph reads as follows:

> 7. Pursuant to General Orders No. 30 and 46, War Department, 1922, the detail to duty involving flying, effective on the date given below, of each of the following named officers, commissioned in or detailed to the Air Corps, who is fit for duty involving flying, and who is detailed to duty requiring regular and frequent participation in aerial flights is hereby announced.
>
> The detail to duty involving flying constitutes participation in one or more of the following: Routine test flights and test flights of new or overhauled aircraft or their power plants, instruments, equipment or accessories; prescribed training of student airplane pilots, student observers or members of aircraft crews; inspection of the adequacy of flight training material; the efficiency of instructing personnel; familiarizing pilots

or other flying personnel with the operation of types of aircraft, power plants, instruments or equipment with which they are inexperienced; experimental development of aircraft or parts of aircraft for experimental development of aviation instruments, equipment or accessories, training for aircraft gunnery and bombing exercises; administrative or inspection purposes in connection with air work or for expediting the movements of pensonnel, material or mail; training of reserve flying personnel; flights duly authorized for the purpose of cooperation with other Governmental Department(s), ferrying aircraft, aerial scouting, reconnaissance, convoy, patrol flights or training for the performance of any of these duties; aerial photography, mapping, pigeon training; tactical maneuvers, and for the study and observation of the physical and psychological conditions of flying personnel:

* * * * *

Captain William D. Wheeler, Air Corps,—August 1, 1927.

* * * * *

All orders in conflict with this order are hereby revoked:
By order of the Chief of Air Corps.

Plaintiff's rating as airplane observer has never been revoked, and since August 1, 1927 he has performed the duties thereof under orders of competent authority and has frequently taken the controls and operated the plane during flights to relieve the pilot. Plaintiff has never been rated by the War Department as a pilot of service aircraft.

5. During the period of his claim, July 1, 1935 to October 3, 1940, inclusive, with the exception of March, April, May, and June, 1936, plaintiff was on duty requiring him to participate regularly and frequently in aerial flights, and under orders of competent authority he performed the flights prescribed by Executive Order of June 27, 1932, and fulfilled the legal requirements to entitle him to flying pay for that period.

6. Plaintiff received flying pay as follows: July 1 to 31, 1935, at $156.25 a month, but on August 7, 1935, he refunded to the Government $36.25 of that amount, as he was required to do; from August 1, 1935 to February 29, 1936, and from July 1, 1936 to June 30, 1940 he received $120 a month;

and from July 1 to October 3, 1940, $60 a month. Since October 4, 1940 plaintiff has received increased flying pay as observer at the rate of 50 percent of his base and longevity pay.

Plaintiff claims 50 percent of his base and longevity pay for the period July 1, 1935 to October 3, 1940, as provided by the Act of July 2, 1926 (44 Stat. 780, 781), amending section 13a of the Act of June 4, 1920 (41 Stat. 759, 768), which increased pay was denied him by the Comptroller General on the ground that, as he did not have the rating of airplane pilot, he was a nonflying officer.

7. If plaintiff is entitled to the increase in pay which he claims, there would be due him the sum of $3,552.98.

The court decided that the plaintiff was not entitled to recover, in an opinion *per curiam*, as follows:

The petition in this case is dismissed upon the authority of *Earl S. Schofield* v. *United States*, No. 45293, decided today. It is so ordered.

JOHN McSHAIN, INC. v. THE UNITED STATES

[No. 45341. Decided October 5, 1942]

On the Proofs

Government contract; Army barracks; addendum to specifications excluding kitchen equipment.—Where plaintiff entered into a contract with the War Department to furnish material and equipment and perform all necessary labor to construct and complete barracks building; and where the specifications as originally writtten required the installation in the kitchen of drip pans and canopies and the drawings designated drip pans and canopies as "kitchen equipment"; and where an addendum to the specifications, headed "Items Not In Contract" excluded "kitchen equipment" from the contract; it is *held* that drip pans and canopies were excluded from the contract between the parties even though the defendant did not intend to exclude them, and plaintiff, having been compelled by the contracting officer to furnish and install said articles, is entitled to recover therefor.

Same; words and phrases.—The expression "kitchen equipment," though it usually means movable equipment, is not an expression of art or trade having a meaning so fixed and universal that it cannot be varied by the context.

Same; language not ambiguous.—Where defendant expressly and unambiguously designated drip pans and canopies as "kitchen equipment" in the drawings, which were an important part of its invitation to bid, it had no right to expect plaintiff not to take the language as meaning what it said.

Same; decision of contracting officer not final on legal question; jurisdiction.—Where the dispute as to the meaning of the contract does not concern a question of fact, in that it is not merely a question of what the defendant intended or what the plaintiff intended by the use of certain words or of what the circumstances were in which such words were used; and where there is a question of what legal doctrine is applicable and what legal effect follows when parties use particular language in certain circumstances and with certain intentions, it is *held* that the decision of the contracting officer is not final, subject to no review, and the Court of Claims has jurisdiction.

The Reporter's statement of the case:

Mr. Joseph P. Tumulty, Jr., for plaintiff.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of New Jersey, and having its principal office and place of business in Trenton, New Jersey.

2. On October 4, 1938, defendant, represented by the Quartermaster General, Construction Division of the War Department, issued specifications for a 375-man barracks building at Camp Dix, New Jersey.

The specifications provided in paragraph SC–11 of the special conditions thereof that the work included the furnishing of material and equipment and the performing of all necessary labor to construct and complete the barracks building, including the utilities thereto, as shown on certain accompanying drawings. Included were drawings designated as numbers 621–1700, 621–1701, and 621–1716. A copy of the specifications and the three drawings, plaintiff's exhibits 1, 2, 3, and 4, respectively, are made a part of this finding by reference.

3. Paragraph 160 of the specifications, and which is included under "Roofing and Sheet Metal," reads as follows:

> 160. DRIP PANS.—Drip pans shall be installed under certain kitchen equipment in kitchens as indicated. Pans shall be furnished by the General Contractor for installation when floor slabs are poured, but this Contractor shall be responsible for the exact locations and proper setting of pans for equipment connections and slope to drains, etc. Pan shall be non-corrodible metal #12 gauge, and shall be approximately 2" deep with edges flanged up and over 1½" on finished floors. All corners and joints shall be welded together. The width and length of pan shall accommodate the equipment that is to be set in it. The pan shall be provided with 3" I. P. drain connection, which shall have a flange welded on bottom of pan around opening and which shall fit the 3" iron pipe connection. Drain opening shall be fitted with removable perforated strainer of non-corrodible metal.

Paragraph KV–7 of the specifications reads as follows:

> Each kitchen shall have a system of ventilation as follows: The large canopy installed over the ranges, kettles, etc., shall have outlets over the various pieces of equipment in the canopy top, which outlets shall be connected, together with the registers in the side of the hood, in a system of ducts, and connected to the fan unit installed in the canopy above the hood. The fan unit shall receive the hot air from same and discharge it into the flue. Drawings showing all portions of the ventilating equipment are included on the plans.

Paragraph KV–8 bears the title "CANOPY" and specifies that the canopy shall be ceiling and wall supported, and further specifices in detail what metals should be used for the construction of the canopy and the canopy ceiling, and the character of joints to be used in the construction of the canopy.

4. The drip pans and kitchen canopy are shown on the contract drawings previously referred to, more particularly 621–1700, entitled basement plan, 621–1701, entitled first floor plan. Various details of the kitchen canopy are also shown on drawing 621–1716, entitled kitchen details. On the first two drawings the locations of various items of kitchen equipment are designated by numerals from 1 to 21, inclusive. Each of these two sheets of drawings contains a legend

"Kitchen equipment" and underneath this legend is given the following itemization:

1. Range
2. Oven
3. Kettles
4. Cooks' Table
5. Bain Marie
6. Coffee Urns
7. Urn Stand
8. Work Table
9. Butchers' Block
10. Preparation Table
11. Potato Peeler
12. Puree Mixer
13. Dish Washer
14. Dish Tables
15. Ice Freezer
16. Meat Slicer
17. Drip Pan
18. Deep Fat Fryer
19. Canopy
20. Steamer
21. Ice Cream Freezer

With the exception of the drip pans and canopy, none of the items in the list was described in the specifications.

5. On October 28, 1938, and prior to the submission of bids on the previously issued specifications, the specifications were amended in certain respects by an addendum thereto, designated as number one, which amended the specifications by adding to the special conditions contained therein a new condition reading as follows:

> SC-20. ITEMS NOT IN CONTRACT.—The following items are not included under the contract:
> a. Shades.
> b. Metal Lockers and Broom Closets.
> c. Linoleum and
> d. Asphalt Tile (but contractor shall prepare the concrete floors as specified, for future installation of linoleum and/or Asphalt Tile).
> e. Metal Shelving.
> f. Kitchen Equipment (but contractor shall rough in for same).

6. Plaintiff after obtaining copies of the specifications, the accompanying drawings, and copies of the addenda to the specifications, submitted a bid in the sum of $325,600. In submitting its bid for that amount, plaintiff made no allowance for drip pans and canopies in the belief that they were not to be included in the contract, but that the contractor would be required to rough in for them, i. e., provide the necessary supports and the placing of pipes or sleeves to facilitate plumbing and electrical work.

7. Plaintiff's bid was accepted and on November 29, 1938, it entered into a contract with the Government represented by Brig. Genl. A. O. Seaman, Q. M. C., Chief of the Construction Division, War Department, as contracting officer. Under the contract, plaintiff agreed to furnish the materials and perform the work for the construction of the barracks building in accordance with the specifications, as amended by the addenda previously referred to, and the contract drawings.

Articles 2 and 15 of the contract read as follows:

> ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.
>
> ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph GC-10 of the specifications provided:

> *Interpretation of the contract.*—Unless otherwise specifically set forth, the contractor shall furnish all materials, labor, etc., necessary to complete the work according to the true intent and meaning of the drawings

and specifications, of which intent and meaning, the C. Q. M. shall be the interpreter. * * *.

A copy of the contract and specifications is made a part of this finding by reference.

Major John R. Tighe, Quartermaster Corps, was the Constructing Quartermaster and the authorized representative of the Contracting Officer.

8. Under the terms of the contract plaintiff was required to begin work by December 6, 1938, and to complete the same by April 20, 1940. Plaintiff actually completed the work and it was accepted on April 11, 1940.

During the course of construction work a controversy arose between the plaintiff and the Constructing Quartermaster as to whether or not plaintiff was required under the contract to furnish and install drip pans and kitchen canopies.

9. A kitchen canopy is generally not a stock item but is required to be fabricated in accordance with plans and specifications for a specific fixed location in a building. The canopy acts as a convector to conduct fumes and smoke to the exhaust ducts and thus comprises the intake structure of the ventilating system, its utility being for the protection and comfort of the occupants of the room in which it is located.

Drip pans generally are not stock items but are built in and connected to and form a part of the floor of the building structure.

10. Under date of January 19, 1939, the Constructing Quartermaster requested plaintiff in writing to furnish a proposal covering certain changes in the work to be performed. This letter (plaintiff's exhibit 7–2) reads in part as follows:

> It is requested that you furnish this office with a proposal covering the following changes in the work to be performed * * *
>
> Item #1 For omitting drip-pans under kitchen equipment as shown on the drawings and specified in paragraph 160 of the specification and continuing the floor finish specified for the rooms in which the pans occur over the area from which the pans are to be omitted.
>
> All applicable provisions of Contract Number ER–W–6108–QM–28 and Specification No. 731–E shall apply to the proposed change.

On March 13, 1939, plaintiff informed the Constructing Quartermaster in writing (plaintiff's exhibit 7-3) that—

> Sometime ago you made inquiry as to the allowance for omission of drip pans in the kitchens.
>
> We wish to advise that there is no credit due for the omission of these pans as they were omitted by Addendum #1, dated at Washington, D. C., October 28th, 1938, under Item 1, SC-20. Item F is Kitchen Equipment, and is definitely omitted from the contract, although the contractor is to rough in for same.
>
> The drip pans are listed as Item 17 under Kitchen Equipment on both drawings #621-1700 and 621-1701.

On March 15, 1939, the Constructing Quartermaster replied to plaintiff in writing as follows (plaintiff's exhibit 7-4):

> Addendum No. 1, dated October 28th, to which you refer in your letter, covers the omission of kitchen equipment only. The Drip Pans are not a part of such equipment although mentioned as Item No. 17 on the contract drawing.
>
> The items of kitchen equipment indicated on the contract drawing is for the information of the contractor in determining the type and location of plumbing and drainage connections. The connections are, of course, a part of your contract.
>
> Addendum No. 1 was issued at the time of bidding, merely to clarify the bidding-documents for several bidders who raised the question as to whether or not the kitchen equipment was to be included in the general contract.
>
> The Drip Pans referred to in the request for proposal are clearly and definitely stipulated under Paragraph 160 of the Specification to be furnished by the general contractor, and there has been no Addendum issued at any time referring to this paragraph of the specification for omitting the drip pans from the work.
>
> You will therefore submit your proposal in accordance with the requirements of our request of January 19th.

11. On April 13, 1939, plaintiff wrote to the Constructing Quartermaster a letter which read, in part, as follows (plaintiff's exhibit 7-5):

> Kindly furnish us with information regarding the canopy's being installed by you under separate contract so the design and location of the duct work can be arranged to suit same.

The Constructing Quartermaster replied on April 20, 1939 (plaintiff's exhibit 7–6), that—

> The canopies are a part of the work under your contract and are to be furnished and installed by you to meet conditions and in accordance with paragraphs KV–7 and KV–8 of the specification.

April 25, 1939, plaintiff replied as follows (plaintiff's exhibit 7–7):

> * * * We note that you state in the last paragraph of your letter that the canopies are a part of the work under our contract, and are to be furnished and installed in accordance with Paragraph KV–7 and KV–8 of the specifications.
>
> This is the second item which has been under discussion, coming under the same heading. The first item over which a question was raised was the Drip Pans, and now the canopies and the curtain.
>
> Addendum #1, dated October 28th, 1938, at Washington, D. C., specifically states that Kitchen Equipment is not included in the contract. The drawings specifically state that Drip Pans listed as Item 17, and Canopies listed as Item 19, are Kitchen Equipment. This is further clarified on drawing 621–1716, in which ventilating ducts are definitely established as one item, and the Kitchen Canopy as a second, through the following wording:
>
> "Plan of Ventilating Ducts over Kitchen Canopy."
>
> We are therefore unable to furnish either of these items without additional compensation.

12. On May 9, 1939, the Constructing Quartermaster sent plaintiff the following letter (plaintiff's exhibit 7–8):

> * * * Inasmuch as you contend that the drip pans and canopies are not a part of your contract, after the interpretation of the contract requirements being made by this office pursuant to paragraph GC–10 of the specification, the matter was referred to the Office of the Quartermaster General for final decision.
>
> The decision rendered is that the drip pans and canopies are included in the contract as called for under paragraphs 160 and KV–8 of the specifications.
>
> You are therefore requested to submit in quadruplicate, the proposal requested in our letter of January

19, 1939, covering the omission of the drip pans. Also, that you submit shop drawings showing the duct installation and canopies as called for in our letter of April 20, 1939.

Plaintiff's reply to the letter of May 9 (plaintiff's exhibit 7-9) read in part as follows:

> * * * It is still our belief that Addendum #1 issued at Washington on October 28th, distinctly omits Kitchen Equipment. When taken in conjunction with the plans sheets 621-1700 and 621-1701 which establishes Item 17 as Drip Pans and Item 19 as canopy, and sheet 621-1716 further establishes the Kitchen Ventilation system as distinct from the canopy, we are entirely justified in claiming an extra for installation of these two items.
>
> Being familiar with Government contract procedure, we advise that without prejudice to our claim, we will proceed with the furnishing of shop drawings for the canopies, and will establish the value of the cost of the drip pans.
>
> Prior to our proceeding with the installation of canopies, and establishing cost of same, as well as cost of drip pans, however, it will be necessary for you to notify us that we are required to do so. * * *

On May 16, 1939, the Constructing Quartermaster sent plaintiff the following letter (plaintiff's exhibit 7-10):

> * * * The 3d paragraph of our letter of May 9 informed you that the decision rendered by the Office of the Quartermaster General, who is the contracting officer in this case, was to the effect that the drip pans and canopies are included in and form a part of the work required under the contract. As such items are a part of the contract, no further authority is needed by you to proceed with the work in connection therewith. * * *

Plaintiff's reply to that letter, dated May 22, was as follows (plaintiff's exhibit 7-11):

> * * * We advise that without prejudice to our claim that this work was omitted from the bids by Addendum #1, dated at Washington, D. C., on October 28th, 1938, we will proceed with the work and appeal the decision quoted by you in your letter of May 9th, 1939, and your

instructions to proceed with this work under date of May 16, 1939.

Our claim will be presented to the Secretary of War in accordance with the provisions of contract Article 15, covering disputes, as the Office of the Quartermaster General, who in this case is the contracting officer, has already rendered the ruling we are protesting.

13. June 6, 1939, plaintiff appealed to the Secretary of War from the decision of the Quartermaster General (plaintiff's exhibit 7–12). July 21, 1939, the Secretary of War affirmed the decision of the Quartermaster General and advised plaintiff of such affirmation by a letter (plaintiff's exhibit 7–13) reading in part as follows:

> * * * Canopies and drip pans are considered as construction items and are so called for in Specifications No. 731–E, which is a part of the contract. Canopies are specified in complete detail under the "Kitchen Ventilation" section (pars. KV–7 and KV–8) of the specifications and drip pans under the "Roofing and Sheet Metal" section (par. 160). While canopies and drip pans were included under the explanatory statement on drawings Nos. 621–1700 and 621–1701 under the heading "Kitchen Equipment," this difference between the drawings and specifications must be determined in accordance with Article 2 of the contract which provides in part as follows:
>
> "In case of difference between drawings and specifications, the specifications shall govern."
>
> Inasmuch as the specifications clearly call for the furnishing and installation of canopies and drip pans by you as contractor, the decision of the contracting officer must be sustained. The decision of the contracting officer is accordingly approved. * * *

Plaintiff was not satisfied with the ruling of the Secretary of War and in a letter dated August 17, 1939, it requested advice as to its next course of appeal.

In reply thereto the Assistant Secretary of War notified plaintiff under date of August 25, 1939 (plaintiff's exhibit 7–15), as follows:

> * * * In the event of continued dissatisfaction at the date of completion of the work under the contract, final payment may be accepted under protest and res-

ervation of right made to file claim for the disputed amount with the Comptroller General of the United States for final decision and settlement.

The afore-mentioned exhibits are made a part of these findings by reference.

14. Plaintiff prepared shop drawings for the kitchen ventilation system and the kitchen canopies. These drawings were submitted to the Constructing Quartermaster and after certain changes and corrections were made the shop drawings were approved. After approval of the drawings plaintiff had the kitchen canopies fabricated and installed by a subcontractor, Edwin H. Huddy & Sons, of Trenton, New Jersey, who also installed the ventilating system.

The total cost to plaintiff for the fabrication and installation of the ventilating system and the kitchen canopies was $5,709.32, of which $1,200 was for the ventilating system, leaving a net cost of $4,509.32 for the kitchen canopies. Plaintiff painted these at a cost of $15, making a total of $4,524.32.

By change order "C" dated February 15, 1940, issued by the contracting officer, plaintiff was allowed the sum of $69.10 as an addition to the contract price for installing a certain grill in each kitchen canopy. Accordingly, the net cost to plaintiff for installing the kitchen canopies was $4,455.22, and adding reasonable overhead and profit of 10 percent of this makes a total of $4,900.74.

15. Under date of February 8, 1940, plaintiff submitted to the Constructing Quartermaster under protest a proposal for $100 credit for the omission of the drip pans. This proposal was accepted by the contracting officer under date of February 15, 1940, and the sum of $100 was deducted by the defendant from the contract price. Adding this amount to the amount claimed by plaintiff for furnishing and installing the kitchen canopies makes plaintiff's total claim the sum of $5,000.74.

16. In its requisition for final payment plaintiff stipulated that such payment would be accepted under protest and without prejudice to plaintiff's right to make further claim.

On April 23, 1940, plaintiff received from the Constructing Quartermaster a check dated April 22, 1940, in the amount of $39,378.71. Plaintiff accepted this check (plaintiff's exhibit 10, made a part hereof by reference) under protest and with the following endorsement thereon:

> This check is accepted under protest and without prejudice to our right to appeal to the Comptroller General and/or other proper parties for payment for installation of kitchen canopies and rebate on credit for drip pans as per correspondence on record.

No other action has been taken on this claim by Congress or by any Department of the Government.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The defendant on October 4, 1938, invited bids for the construction of a 375-man barracks building at Camp Dix, N. J. The specifications which were issued with the invitations for bids contained, *inter alia*, paragraph 160, quoted in finding 3, which required the installation of drip pans under certain kitchen equipment "as indicated," and described them in detail. The specifications also contained paragraph KV7 relating to kitchen ventilation and calling for the installation of canopies in each kitchen over the ranges, kettles, etc. The paragraph said: "Drawings showing all portions of the ventilating equipment are included on the plans."

The drawings referred to in paragraph KV7, and which accompanied the proposed contract are described in finding 4. They showed the drip pans and canopies. On two of the drawings the location of various items of kitchen equipment is marked by numbers running from 1 to 21. Each of these drawings had on it a list with the heading "Kitchen Equipment" and under the heading were 21 items, numbered 1 to 21. This list is copied in finding 4. Many of the items were movable, such as tables, coffee urns, etc. Of the items listed, only items 17, "Drip Pans," and 19, "Canopy," were otherwise mentioned in the specifications. The defendant did not intend that the contractor should furnish any of the

21 items except those two. The others were listed and their locations shown only for the purpose of showing what roughing-in was expected of the contractor to make the kitchen ready for them. Several prospective bidders, not including plaintiff, asked the defendant whether the specifications meant that all the listed kitchen equipment was to be furnished by the contractor. The defendant then, before the bids were submitted, furnished all invitees with an addendum to the specifications, which is quoted in finding 5. It was headed "ITEMS NOT IN CONTRACT" and contained the following:

> f. Kitchen equipment (but contractor shall rough in for same).

Plaintiff construed the amended invitation to mean that the contractor was not to furnish the drip pans or canopies or any other kitchen equipment. It computed its bid accordingly. The contract was awarded to plaintiff. The defendant, however, during the course of the construction, advised plaintiff that it regarded plaintiff as bound to furnish and install the drip pans and canopies, and insisted that plaintiff install the canopies, and make a proposal for a reduction of the contract price on account of omitting the drip pans, which the defendant had decided not to have installed. Plaintiff complied, making protests adequate to preserve its rights.

Our task is that of determining what was the contract made by the parties. The defendant contends, in effect, that the drip pans and canopies were not "kitchen equipment" within the meaning of that term as known to the trade, and that therefore the exclusion of kitchen equipment from the contract by the addendum was not intended to exclude these items, and plaintiff should have known that. The expression does, primarily, mean moveables prefabricated and susceptible of use in more than one kitchen. The drip pans and canopies here involved were to be built to order according to given specifications, and were to be especially adapted to and attached to the structure of the kitchen. We would have no hesitancy in calling them "fixtures" if that were our problem. These items would not, therefore, fall within the

usual meaning of the expression "kitchen equipment." We do not think, however, that that expression is an expression of art or trade having a meaning so fixed and universal that it cannot be varied by the context. And we think that when the defendant expressly and unambiguously designated these items as kitchen equipment in the drawings which were an important part of its invitation to bid, it had no right to expect plaintiff not to take the language as meaning what it said. To sum up, the specifications as originally written required the installation of drip pans and canopies, the drawings designated these things as kitchen equipment, and the addendum excluded kitchen equipment from the contract. Plaintiff interpreted this language in these several writings to mean that the things in question were excluded. We think that was the reasonable interpretation of the defendant's language and was the contract of the parties. See Restatement of Contracts, sec. 230.

The defendant contends that we are not free to decide the question here involved because, by certain provisions of the contract and the specifications, the power of decision is lodged elsewhere. These provisions are quoted in finding 7.

Article 2 of the contract contains this sentence:

> In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense.

We do not regard this language as lodging in the contracting officer a power of final decision, of which plaintiff is entitled to no review, even within the department. It apparently is inserted to prevent the contractor from himself resolving discordant provisions and building accordingly, thus creating a situation difficult to repair. Cf. *Penker Construction Co. v. United States* (C. Cls., decided Feb. 2, 1942). It would take language much more explicit than the quoted sentence to show an intent on the part of the contractor to lodge so absolute a power as is suggested by the defendant's argument in an agent of the other party to the contract.

What has just been said about Article 2 of the contract is also applicable to Paragraph G–C 10 of the specifications, quoted in finding 7. It might also be said that the question was not one of discrepancy between several concurrent documents, but of whether or not a later writing, the addendum, had eliminated from the contract a part of an earlier writing, the specifications.

Article 15 of the contract contains the following provision:

> ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

The dispute here involved does not concern a question of fact. It is not merely a question of what the defendant intended or what plaintiff intended by the use of certain words, or of what were the circumstances in which they were used. It is a question of what legal doctrine is applicable and what legal effect follows when parties with intentions such as those found use such language in circumstances such as these. We think, therefore, that we are not ousted of our jurisdiction by Article 15.

It follows that plaintiff may recover the amount of the deduction from the contract price which it was required to make on account of the drip pans, $100.00, and the cost of the canopies, $4,455.22, with a 10% allowance for profit on the latter, a total of $5,000.74.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

CITY BANK FARMERS TRUST COMPANY, VIRGINIA H. BERG AND RUTH H. COWEN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF CLARENCE J. HOUSMAN, DECEASED, TRUST FOR VIRGINIA H. BERG, v. THE UNITED STATES

[No. 45470. Decided October 5, 1942]

On the Proofs

Income tax; percentage rate of tax applicable to profit on sale of partnership interest under section 117 of the Revenue Act of 1936.—Where a partner sells his interest in a partnership business; it is *held* that the holding period for the purpose of applying the percentage rate specified in section 117 of the Revenue Act of 1936 (Title 26, U. S. Code, section 873) is to be measured from the date or dates of acquisition by the partnership of the specific partnership assets which the partnership owned at the date of sale of the "partner's interest," and plaintiffs are not entitled to recover.

Same; partnership is an association of individuals.—For Federal tax purposes, in the absence of a specific statutory provision to the contrary, a partnership is treated as an association of individuals who are vested with an interest in the specific property of the partnership. *Craik* v. *United States*, 90 C. Cls. 345.

Same; State law.—State law may control only when the Federal taxing act, by express language, or necessary implication, makes its own operation dependent upon State law. *Burnet* v. *Harmel*, 287 U. S. 103, 110; *Lyeth* v. *Hoey*, 305 U. S. 188, 191–194.

Same; partnership at common law.—At common law, the personal property of the partnership was held not by the partnership but by the partners in common, and real estate was held by an individual for the benefit of the partnership, because a partnership was not an entity and, therefore, could not hold title. *Craik* v. *United States*, 90 C. Cls. 345.

Same.—At common law, each partner was liable for the debts of the partnership on the theory that they were the debts of the partners and not the debts of the partnership.

Same.—At common law, each partner was the agent for the other partners in the carrying out of their common purpose.

The Reporter's statement of the case:

Mr. Herbert Stern for the plaintiffs. *Mr. Aaron W. Berg* was on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

In this case plaintiffs seek to recover $7,326.11 alleged overpayment of income tax and interest, on the ground that their "interest" in a partnership acquired upon the death in 1932 of a member of the partnership and sold by them December 31, 1936, was a capital asset under and within the meaning of the capital gains section 117, Revenue Act of 1936, and that since they had held such "interest" for more than two years and not for more than five years, they were taxable only on 60 percent of the gain realized from the sale.

The defendant contends that plaintiffs, who continued, after the death of C. J. Housman, to share in the profits and losses of the partnership of E. A. Pierce & Company, should be considered, for Federal income tax purposes and the purposes of section 117, as having acquired and held a pro-rata interest in the specific assets constituting the property of the partnership from the acquisition by the partnership of such assets to the date of sale by plaintiffs of their interest.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiffs are the duly appointed, qualified and acting trustees of the trust for Virginia H. Berg, under the will of Clarence J. Housman, deceased, who died a resident of Monmouth County, New Jersey, November 13, 1932, and whose will was admitted to probate before the Surrogate's Court, Monmouth County, November 29, 1932. At the time of his death Clarence J. Housman was a limited partner of the firm of E. A. Pierce & Co., by virtue of a partnership

agreement made and executed in the City of New York and dated January 18, 1930, and thereafter amended from time to time by supplemental agreements made and executed in the City of New York. The partnership agreement and the amendment thereto provided that the assignee of a limited partner shall have the right to become a substitute limited partner with all the rights and obligations of his predecessor and further that the term assignee shall include the executor, administrator, committee or other legal representative of a limited partner. The decedent herein was entitled to share in the profits of the partnership in the proportion of 3⅓% and to bear the losses in like proportion, it being provided "that in no event shall any of the limited partners be liable for said losses, or any part thereof, in excess of their respective capital contributions", such excess losses to be borne by the general partners.

By agreement December 16, 1933, it was further agreed that the capital contribution of Clarence J. Housman, deceased, was being continued by his estate and that the estate as assignee should continue to share in the partnership profits and losses to the same extent as he had prior to his death.

At no time herein mentioned did the plaintiffs' testator, or his successors in interest, ever take an active part in the management of the said partnership, nor were they entitled to do so under the terms of the aforesaid agreements. January 18, 1930, the date of the first agreement mentioned above, the firm of E. A. Pierce & Co. consisted of twenty-three general partners and five limited partners, the above named decedent being one of the latter, and at all times thereafter said firm was composed of at least twenty general partners, and at least three limited partners, the above named decedent, and following his death, the executors and trustees of his estate, always being one of the latter. The firm of E. A. Pierce & Co. was at all times herein mentioned a limited partnership duly organized and existing under and by virtue of the Partnership Law of the State of New York (Laws of 1919, Chapter 408, as amended), and was engaged in transacting a general

brokerage business in stocks, bonds and other securities and commodities, having its principal place of business and office in New York City, New York.

2. Upon the death of Clarence J. Housman his above mentioned interest as a limited partner in the firm of E. A. Pierce & Co. duly passed to the executors of his estate, pursuant to the terms of the agreement of January 18, 1930, and the amendments thereto, and was so held by said executors until August 1, 1936, on which date, and pursuant to the terms of the will, one-half of his interest in said partnership was transferred to the plaintiffs herein, as trustees of the trust for Virginia H. Berg. Plaintiffs, as such trustees, held, pursuant to the terms of said agreement of January 18, 1930, and the amendments thereto, said partnership interest until December 31, 1936, on which date they sold it for $189,550.25.

On the date of the aforesaid sale, the cost base of the above mentioned partnership interest held by the plaintiffs herein was evaluated at $119,364.45, said figure representing the fair evaluation of said interest as of the date of testator's death, as approved by the estate tax authorities of the Treasury Department and as reflected in the federal estate tax return filed by the estate and upon which a federal estate tax was paid, plus all gains and minus all losses which were included in the income tax returns regularly and properly filed by said testator's estate, upon which income taxes had been fully and properly paid from the date of his death to December 31, 1936.

3. March 15, 1937, plaintiffs, as trustees, herein, filed with the Collector of Internal Revenue an income tax return setting forth a $44,819.59 taxable income as having been received by their trust during 1936. In the fiduciary return, Form 1041, upon which this return was based plaintiffs reported as taxable income to their trust only 60% of the gain realized upon the aforementioned sale of their partnership interest on the ground that the provisions of section 117 (a) and (b) of the Revenue Act of 1936 were applicable thereto, since the gain realized from said sale had been the result of the sale of a capital asset, which had been held by the tax-

payers for more than two and for not more than five years, *i. e.*, from November 13, 1932 (the date of testator's death) to December 31, 1936 (the date of sale by plaintiffs). With the filing of said return plaintiffs paid $7,939.07, the income tax due, as computed in said return.

4. Thereafter the plaintiffs received a report from the Internal Revenue Agent May 10, 1937, accompanied by a thirty-day letter, dated August 28, 1937, recommending an additional tax of $1,015.08 due from the above mentioned estate of Clarence J. Housman, deceased, based upon the income of said estate for 1935. This additional sum was paid by said estate to the Collector September 14, 1937. As a result of this payment the above mentioned cost base of plaintiffs' interest in the firm of E. A. Pierce & Co. was increased to $124,230.25. Had this increased cost base been reflected in the return filed by plaintiffs herein for 1936, the net taxable income which would have been reported would have been $41,900.11, instead of the above mentioned sum of $44,819.59. Consequently, if the plaintiffs are correct in their computation of the tax on the return as originally filed, the income tax payable by the plaintiffs for 1936 would have been reduced from $7,939.07 (the sum actually paid) to $6,972.03 (the sum which should have been paid), a difference of $967.04.

5. September 23, 1937, within the time allowed by law, plaintiffs filed a claim for the refund of approximately $1,000.

This claim set forth that the plaintiffs had sold or exchanged their partnership interest in the firm of E. A. Pierce & Co., December 31, 1936, this partnership interest being one of the assets of the estate of Clarence J. Housman, deceased, who died November 13, 1932; that the executors of the estate had continued this interest in the partnership and on August 1, 1936, had transferred one-half thereof to the plaintiff-trustees, pursuant to the terms of the will of Clarence J. Housman, deceased, and that the plaintiff-trustees had continued in the partnership until the termination of their interest by sale or exchange December 31, 1936; that the cost base of the plaintiffs' inter-

est in the firm of E. A. Pierce & Co. was evaluated at $119,364.45, and the price received therefor was $189,550.25; that the report of the Internal Revenue Agent in Charge had recommended an additional income tax assessment against the estate of Clarence J. Housman, deceased, for 1935, of $1,015.08, which had been paid September 14, 1937; that this report and the resultant additional assessment were based upon changes in the taxable income of the firm of E. A. Pierce & Co. for 1935, which changes resulted in a substantial increase in the cost base of the plaintiffs' interest in E. A. Pierce & Co., with the attendant decrease in the amount of taxable profits thereon for 1936, resulting in the decrease in the amount of income tax payable for 1936 from $7,939.07, the amount paid, to $6,972.03, the sum due and payable, namely, the sum of $967.04, the payment of which sum, together with legal interest from March 15, 1937, is now sought in this action.

6. Thereafter the Commissioner of Internal Revenue notified plaintiffs September 12, 1939, by registered mail that the claim for refund had been rejected in full. By letter November 2, 1939, the Commissioner explained that the claim was disallowed "for the reason that additional taxes were found due, which you state you have paid." The two aforesaid letters by this reference thereto are incorporated herein by reference.

7. July 22, 1938, the Revenue Agent in Charge advised the trust for Virginia H. Berg that a field investigation disclosed a deficiency in tax of $8,363.01 for 1936. In arriving at this deficiency, the profit from the sale of the partnership interest was held 100 percent taxable. A formal protest was filed August 12, 1938, and conferences were subsequently held in the revenue agent's office September 9, 1938, October 27, 1938, and January 4, 1939. In connection therewith on November 29, 1938, John Humm, the auditor for the partnership, filed an affidavit, showing the dates of acquisition of the various individual partnership assets, thus reflecting the length of time the various individual assets of the partnership had been held. As a result of these conferences, the proposed deficiency in tax was

reduced from $8,363.01 to $5,691.46. In arriving at this deficiency, a cost basis for the sale of the partnership asset of $124,230.24 was used and the total profit of $58,985.57 attributable to this taxpayer subject to tax was computed as follows:

Assets held 1 to 2 years (3⅓%)	$1,469.83
80% of profit to be taken into account.	
Assets held 2 to 5 years (3⅓%)	91,173.60
60% of profit to be taken into account.	
Assets held less than 1 year (3⅓%)	286,457.06
100% of profit to be taken into account.	
Aggregate proceeds received by both Trusts from sale	379,100.49
Cost Base	248,460.48
Gain on Sale	130,640.01
One-half of gain to Trust for Ruth H. Cowen	65,320.01
One-half of gain to Trust for Virginia H. Berg	65,320.00
	130,640.01

Percentage for application of limitation section 117 (a) of the 1936 Act.

Period held	Percentage to be applied to net profit	Total net profit on sale each trust separate	Profit applicable to each period of ownership	Percentage subject to tax	Profit subject to tax
1 to 2 years	$\frac{\$1,469.83}{379,100.49}\times$	$65,320.00=	$253.26	80%	$202.61
2 to 5 years	$\frac{91,173.60}{379,100.49}\times$	65,320.00=	15,709.45	60%	9,425.67
Less than 1 year	$\frac{286,457.06}{379,100.49}\times$	65,320.00=	49,357.29	100%	49,357.29
			65,320.00		58,985.57
Profit previously included in income					65,320.00
Adjustment					6,334.43

These figures and calculations were reflected in the revised schedules of the Treasury Department, Office of the Internal Revenue Agent in Charge, Newark Division, March 23, 1939.

A waiver assenting to the assessment and collection of the tax of $5,691.46 was filed by the trust for Virginia H. Berg February 2, 1939.

8. Plaintiffs on April 5, 1939, pursuant to the above mentioned revised schedules and waiver paid to the Collector $5,691.46, on account of additional taxes demanded, plus $667.61, as interest for the period March 15, 1937, to March 1, 1939, totaling $6,359.07.

9. Thereafter, July 8, 1940, within the time allowed by law, plaintiffs filed a claim for the refund of the $6,359.07 paid by plaintiffs, as set forth in the next preceding paragraph, together with legal interest thereon from March 30, 1939. More than six months at the time the petition was filed had elapsed since the plaintiffs filed their claim for refund and the Commissioner had not advised plaintiffs of any action thereon. June 14, 1941, plaintiffs were advised by registered mail that the claim had been disallowed and no part of the amount herein sought to be recovered has been refunded to the plaintiffs.

10. Plaintiffs' claim for refund set forth that the taxpayers had sold or exchanged their partnership interest in the firm of E. A. Pierce & Co. December 31, 1936, said partnership interest being one of the assets of the estate of Clarence J. Housman, deceased, who died on November 13, 1932; that the executors of said estate had continued this interest in the partnership until August 1, 1936, when they transferred one-half thereof to plaintiffs, pursuant to the terms of the testator's will, and that the plaintiffs had continued to hold said partnership interest until the sale thereof on December 31, 1936; that the taxpaying trustees had reported only 60% of the gain realized upon the sale of said partnership interest in its return for 1936, pursuant to section 117 (a) and (b) of the Revenue Act of 1936, inasmuch as said interest had been held as a capital asset for more than two, but for not more than five years; the Collector of Internal Revenue maintained that the tax due under section 117 (a) and (b) of the Revenue Act of 1936 from the plaintiff-taxpayers was determined by and measured from the date of acquisition by and the date of disposal by the partnership of E. A. Pierce & Co. of the specific assets belonging to the partnership of E. A. Pierce & Co., in which plaintiffs herein, it was claimed, owned a pro rata interest.

The court decided that the plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiffs, as trustees for Virginia H. Berg, contend that the sale by them of their interest in the partnership of E. A. Pierce & Company on December 31, 1936, was the sale of a capital asset held by them since the death of their testator, Clarence J. Housman, on November 13, 1932, and for more than two years and not for more than five years under and within the meaning of section 117 (a) and (b) of the Revenue Act of 1936 and that, therefore, only 60 percent of the gain realized upon such sale of their interest in the partnership in December 1936 should have been included in computing the net income of the trustees for 1936.

Clarence J. Housman was at the time of his death, November 13, 1932, a limited partner of the firm of E. A. Pierce & Company under a partnership agreement dated January 18, 1930. The partnership agreement, as amended from time to time prior to his death, provided that the assignee of the limited partnership should have the right to become a substitute limited partner and, further, that the term "assignee" should include the executor, administrator, committee or other legal representative of a limited partner. The decedent was entitled to share in the profits of the partnership in the proportion of 3⅓ percent, but was not liable for any losses in excess of his respective capital contributions.

By agreement of December 16, 1933, after Housman's death, it was further agreed that the capital contribution of Clarence J. Housman should be continued by his estate and that the estate, as assignee, should continue to share in the partnership profits and losses to the same extent as he had prior to his death.

Upon the death of Clarence J. Housman, his interest in the partnership of E. A. Pierce & Company passed to the executors of his estate and was held by them until August 1, 1936, upon which date one-half of his interest in the partnership was transferred to the plaintiffs herein as trustees of the trust for Virginia H. Berg, and the other half was

transferred to the plaintiffs, as trustees, of the trust for Ruth H. Cowen. Plaintiffs, as trustees, held the partnership interest of the decedent until December 31, 1936, at which time they sold it for $189,550.25. (This represents one-half of the sales price of the full partnership interest.)

On the date of the sale, the cost basis of the partnership interest was evaluated at $119,364.45, this figure representing the fair valuation of the interest as of the date of Housman's death, as reflected in the estate-tax return, and upon which a Federal estate tax was paid, plus all gains and minus all losses which were included in the income-tax return regularly and properly filed by the estate. In due course plaintiffs, as trustees, filed an income-tax return for 1936 showing a taxable income of $44,819.59. In the Federal fiduciary return form, upon which this return was based, plaintiffs reported as taxable income only 60 percent of the gain realized on the sale of the partnership interest on the ground that the gain realized from the sale had been the result of the sale of a capital asset which had been held by the taxpayers for more than two and not more than five years.

The Commissioner determined a deficiency in respect of the tax due by the Virginia H. Berg trust of $5,691.46 in excess of the tax of $7,939.07 paid upon the return. In arriving at this deficiency a cost basis for the sale of the partnership asset of $124,230.24 was used, resulting in a total profit of $130,640.01, of which one-half, or $65,320, was attributable to the trust for Virginia H. Berg. A total taxable profit of $58,985.57 for this trust was determined. In computing the percentage of gain to be taken into account, it was determined that, of the aggregate proceeds of $379,-100.49, the amount of $91,173.60 represented assets held two to five years, of which 60 percent of the profit was taken into account; the amount of $1,469.83 represented assets held one to two years, of which 80 percent was taken into account; and the amount of $286,457.06 represented assets held less than one year, of which 100 per cent of the profit was taken into account.

The question presented is whether, when a partner sells his interest in a partnership business, the holding period

for the purpose of applying the percentage rate specified in section 117 of the Revenue Act of 1936, U. S. C. Title 26, sec. 873, is to be measured from the date of the partner's acquisition of the partnership interest, or whether the holding period is to be measured from the date or dates of acquisition by the partnership of the specific partnership assets which the partnership owned at the date of sale of the "partner's interest." Section 117 provides as follows:

> (a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:
>
> 100 per centum if the capital asset has been held for not more than 1 year;
> 80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;
> 60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;
> 40 percentum if the capital asset has been held for more than 5 years but not for more than 10 years;
> 30 per centum if the capital asset has been held for more than 10 years.
>
> (b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

Plaintiffs' contention in substance is that the capital asset which they sold on December 31, 1936, was their "interest" in the partnership of E. A. Pierce & Company, that is, their right to share in the profits and losses, which they acquired November 13, 1932, upon the death of Clarence J. Housman, a member of the partnership, and that they were therefore liable to tax upon only 60 percent under section 117 of the gain realized. In other words, plaintiffs contend for the separate entity theory of a partnership and argue that the partnership interest is by its very nature separate and dis-

tinct from the specific assets owned by the partnership itself; that it consists of certain rights against the other partners, but does not include any title or assignable interest in and to a pro rata share of the specific partnership assets. They, therefore, insist that the date when the "interest" in the partnership, as such, was acquired by them should mark the date of the beginning of the holding period. We cannot agree.

For Federal tax purposes in the absence of a specific statutory provision to the contrary, a partnership is treated, and therefore must be considered, as an association of individuals who are vested with an interest in the specific property of the partnership. This has become increasingly clear under recent decisions.

In *Craik* v. *United States*, 90 C. Cls. 345, 350, 351, this court said:

> The treatment of partnership income on the same basis as though it had been received by the partner directly is consistent with the common-law idea of a partnership. At common law, the personal property of the partnership was held not by the partnership, but by the partners in common. Real estate was held by an individual for the benefit of the partnership, because a partnership was not an entity and, therefore, could not hold the title. Each partner was liable for the debts of the partnership on the theory that they were the partners' debts and not the debts of the partnership. Each partner was the agent for the other partners in the carrying out of their common purpose. The income earned by the partnership was regarded as having been earned by each of the individual partners, either by himself individually or through his agents, the other partners.

We accordingly held in the *Craik* case that income of a domestic partnership from sources without the United States retained its character as such when received by one of the partners, a nonresident alien, and should have been excluded from his taxable income as income received from sources without the United States.

In *Neuberger* v. *Commissioner*, 311 U. S. 93, the court held that an individual having net losses from sales of non-capital assets not connected with a partnership of which he

was a member, was authorized to deduct such losses in computing his individual taxable income from his distributable share of gains of the partnership from sales by the partnership of noncapital assets. In discussing the question, the court, at p. 88, said:

> Sections 181–189 of the Revenue Act of 1932, 47 Stat. 169, 222–223, provide generally for computation and reporting of partnership income. In requiring a partnership informational return, although only individual partners pay any tax, Congress recognized the partnership both as a business unit and as an association of individuals. This weakens rather than strengthens respondent's argument that the privileges are distinct or that the unit characteristics of the partnership must be emphasized. Compare *Jennings* v. *Commissioner*, 110 F. 2d 945; *Craik* v. *United States*, 31 F. Supp. 132; *United States* v. *Coulby*, 251 F. 982 (affirmed, 258 F. 27). Nor is the deduction claimed here precluded because Congress, in §§ 184–188, has particularized instances where partnership income retains its identity in the individual partner's return. The maxim *expressio unius est exlusio alterius* is an aid to construction, not a rule of law. It can never override clear and contrary evidences of Congressional intent. *United States* v. *Barnes*, 222 U. S. 513.

Upon these decisions we hold that a partnership is to be considered, for the purpose of measuring the holding period of the assets under section 117, as an association of individuals who, for taxing purposes, are vested with an interest in the specific partnership property, and that the defendant properly computed the gain includable in income upon the sale by plaintiffs of their interest in the partnership on December 31, 1936. Most of the assets which the partnership held at that time were acquired in years subsequent to the date of death of Clarence J. Housman on November 13, 1932, and it cannot, therefore, be said that plaintiffs held such assets or a pro-rata interest therein at the date of Housman's death.

Plaintiffs rely strongly on certain provisions of the New York statute—that statute having adopted the uniform partnership act. But we are of opinion that the statute is not controlling here. In *Helvering* v. *Smith*, 90 Fed. (2d)

590, the court had occasion to consider the nature of an interest in a partnership under the law of New York and pointed out that the Uniform Partnership Act did not make a firm an independent juristic entity. The court, at pp. 591, 592, said:

> With this history before us, it would be a palpable perversion to understand the act as creating a new juristic person, which owned the firm property and was obligor of the firm debts, against which the partners had only a chose in action, and to which they were liable as guarantors.
>
> Moreover, the Revenue Act gives no color to such a theory, but was framed on precisely the opposite plan. From the outset the tax had been imposed on the partners, and their taxable income has included their distributive shares, whether distributed or not.

In *Stilgenbaur* v. *United States*, 115 Fed. (2d) the court held that in California, where the Uniform Partnership Act had been adopted, a sale by a retiring partner of his interest to the other partners was a sale of capital assets under section 117 (b) of the Revenue Act of 1934. While that case did not involve the holding period, it is applicable in principle to the question here presented. The court, at p. 285, said:

> Under the California law a partner has three distinct interests arising from his partnership. One is his co-ownership in the specific property of the partnership property, another is his interest in the partnership as such, and the third is his right to participate in the management.

In *Burnet* v. *Harmel*, 287 U. S. 103, 110, and *Lyeth* v. *Hoey*, 305 U. S. 188, 191–194, the court held that "State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law."

Plaintiffs are not entitled to recover and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

CITY BANK FARMERS TRUST COMPANY, VIRGINIA H. BERG AND RUTH H. COWEN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF CLARENCE J. HOUSMAN, DECEASED, TRUST FOR RUTH H. COWEN, v. THE UNITED STATES

[No. 45471. Decided October 5, 1942]

On the Proofs

Income tax; percentage of tax applicable to profit on sale of partnership interest under section 117 of the Revenue Act of 1936.—Decided upon the authority of *City Bank Farmers Trust Company et al* v. *The United States* (No. 45470), *ante*, p. 296.

The Reporter's statement of the case:

Mr. Herbert Stern for the plaintiffs. *Mr. Aaron W. Berg* was on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

In this case plaintiffs seek to recover $7,326.11 alleged overpayment of income tax and interest, on the ground that their "interest" in a partnership acquired upon the death in 1932 of a member of the partnership and sold by them December 31, 1936, was a capital asset under and within the meaning of the capital gains section 117, Revenue Act of 1936, and that since they had held such "interest" for more than two years and not for more than five years, they were taxable only on 60 percent of the gain realized from the sale.

The defendant contends that plaintiffs, who continued, after the death of C. J. Housman, to share in the profits and losses of the partnership of E. A. Pierce & Company, should be considered, for Federal income tax purposes and the purposes of section 117, as having acquired and held a pro-rata interest in the specific assets constituting the property of the partnership from the acquisition by the partnership of such assets to the date of sale by plaintiffs of their interest.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiffs are the duly appointed, qualified, and acting trustees of the trust for Ruth H. Cowen, under the will of Clarence J. Housman, deceased, who died a resident of Monmouth County, New Jersey, November 13, 1932, and whose will was admitted to probate before the Surrogate's Court, Monmouth County, November 29, 1932. At the time of his death Clarence J. Housman was a limited partner of the firm of E. A. Pierce & Co., by virtue of a partnership agreement made and executed in the City of New York January 18, 1930, and thereafter amended from time to time by supplemental agreements made and executed in the City of New York. The partnership agreement and the amendments thereto provided that the assignee of a limited partner shall have the right to become a substitute limited partner with all the rights and obligations of his predecessor and further that the term assignee shall include the executor, administrator, committee and other legal representative of a limited partner. The decedent herein was entitled to share in the profits of the partnership in the proportion of 3⅓% and to bear the losses in like proportion, it being provided "that in no event shall any of the limited partners be liable for said losses, or any part thereof, in excess of their respective capital contributions," such excess losses to be borne by the general partners.

By agreement, December 16, 1933, it was further agreed that the capital contribution of Clarence J. Housman, deceased, was being continued by his estate and that the estate as assignee should continue to share in the partnership profits and losses to the same extent as he had prior to his death.

At no time herein mentioned did the plaintiffs' testator, or his successors in interest, ever take an active part in the management of said partnership, nor were they entitled to do so under the terms of the aforesaid agreements. January 18, 1930, the date of the first agreement mentioned above, the firm of E. A. Pierce & Co. consisted of twenty-three general partners and five limited partners, the above named decedent being one of the latter, and at all times

thereafter said firm was composed of at least twenty general partners, and at least three limited partners, the above named decedent, and following his death, the executors and trustees of his estate, always being one of the latter. The firm of E. A. Pierce & Co. was at all times herein mentioned a limited partnership duly organized and existing under and by virtue of the Partnership Law of the State of New York (Laws of 1919, Chapter 408, as amended), and was engaged in transacting a general brokerage business in stocks, bonds and other securities and commodities, having its principal place of business and office in New York City, New York.

2. Upon the death of Clarence J. Housman, his above mentioned interest as a limited partner in E. A. Pierce & Co. passed to the executors of his estate, pursuant to the terms of the agreement of January 18, 1930, and the amendments thereto, and was so held by said executors until August 1, 1936, on which date, pursuant to the terms of the will, one-half of his interest in said partnership was transferred to the plaintiffs herein, as trustees of the trust for Ruth H. Cowen. Plaintiffs, as such trustees, held, pursuant to the terms of said agreement of January 18, 1930, and the amendments thereto, said partnership interest until December 31, 1936, on which date they sold it for $189,550.25.

On the date of sale, the cost base of the above mentioned partnership interest held by plaintiffs herein was evaluated at $119,364.45, said figure representing the fair evaluation of said interest as of the date of testator's death, as approved by the estate tax authorities of the Treasury Department, and as reflected in the estate tax return filed by the estate and upon which a federal estate tax was paid, plus all gains and minus all losses which were included in the income tax returns regularly and properly filed by said estate, upon which income taxes had been fully and properly paid from the date of his death to December 31, 1936.

3. March 15, 1937, plaintiffs, as trustees, herein, filed with the Collector for the District of Newark, New Jersey, an income tax return setting forth a $44,819.58 taxable income as having been received by their trust during 1936. In the fiduciary return, Form 1041, upon which this return was

based plaintiffs reported as taxable income to their trust only 60% of the gain realized upon the aforementioned sale of their partnership interest on the ground that the provisions of section 117 (a) and (b) of the Revenue Act of 1936 were applicable thereto, since the gain realized from said sale had been the result of the sale of a capital asset, which had been held by the taxpayers for more than two and for not more than five years, i. e., from November 13, 1932 (the date of testator's death) to December 31, 1936 (the date of sale by plaintiffs). With the filing of said return the plaintiffs paid $7,939.07, the income tax due, as computed in said return.

4. Thereafter plaintiffs received a report from the Internal Revenue Agent, Newark, New Jersey, May 10, 1937, accompanied by a thirty-day letter, August 28, 1937, recommending an additional tax of $1,015.08 due from the above mentioned estate of Clarence J. Housman, deceased, based upon the income of said estate for 1935. This additional sum was paid by said estate to the collector September 14, 1937. As a result of this payment the above mentioned cost base of plaintiffs' interest in the firm of E. A. Pierce & Co. was increased to $124,230.25. Had this increased cost base been reflected in the return filed by plaintiffs herein for 1936, the net taxable income which would have been reported would have been $41,900.11, instead of the above mentioned sum of $44,819.59. Consequently, if plaintiffs are correct in their computation of the tax on the return as originally filed, the income tax payable by the plaintiffs for 1936 would have been reduced from $7,939.07 (the sum actually paid) to $6,972.03 (the sum which should have been paid), a difference of $967.04.

5. September 23, 1937, within the time allowed by law, plaintiffs herein duly filed with the collector a claim for the refund of approximately $1,000.

This claim set forth that the plaintiffs had sold or exchanged their partnership interest in the firm of E. A. Pierce & Co., December 31, 1936, this partnership interest being one of the assets of the estate of Clarence J. Housman, deceased, who died November 13, 1932; that the executors of the estate had continued this interest in the partnership

and on August 1, 1936, had transferred one-half thereof to the plaintiff-trustees, pursuant to the terms of the will of Clarence J. Housman, deceased, and that the plaintiff-trustees had continued in the partnership until the termination of their interest by sale or exchange on December 31, 1936; that the cost base of the plaintiffs' interest in the firm of E. A. Pierce & Co. was evaluated at $119,364.45, and the price received therefor was in the sum of $189,550.25; that the report of the Internal Revenue Agent in Charge had recommended an additional income tax assessment against the estate of Clarence J. Housman, deceased, for 1935, in the sum of $1,015.08, which sum had been paid September 14, 1937; that this report and the resultant additional assessment were based upon changes in the taxable income of E. A. Pierce & Co. for 1935, which changes resulted in a substantial increase in the cost base of the plaintiffs' interest in E. A. Pierce & Co., with the attendant decrease in the amount of taxable profits thereon for 1936, resulting in the decrease in the amount of income tax payable for 1936 from $7,939.07, the amount paid, to $6,972.03, the sum due and payable, namely, the sum of $967.04, the payment of which sum, together with legal interest from March 15, 1937, is now sought in this action.

6. Thereafter the Commissioner of Internal Revenue notified the plaintiffs September 12, 1939, by registered mail that the above mentioned claim for refund had been rejected in full. By letter November 2, 1939, the Commissioner explained that the claim was disallowed "for the reason that additional taxes were found due, which you state you have paid." The two aforesaid letters by this reference thereto are incorporated herein by reference.

7. By letter July 22, 1938, the Revenue Agent in Charge advised the trust for Ruth H. Cowen that a field investigation disclosed a deficiency in tax of $8,363.01 for 1936. In arriving at this deficiency the profit from the sale of the partnership interest was held 100 percent taxable. A formal protest was filed August 12, 1938, and conferences were subsequently held in the revenue agent's office September 9, 1938, October 27, 1938, and January 4, 1939. In connection therewith on November 29, 1938, John Humm, the auditor

for the partnership, filed an affidavit, showing the dates of acquisition of the various individual partnership assets, thus reflecting the length of time the various individual assets of the partnership had been held. As a result of these conferences, the proposed deficiency in tax was reduced from $8,363.01 to $5,691.46. In arriving at this deficiency, a cost basis for the sale of the partnership asset of $124,230.24 was used and the total profit of $58,985.57 attributable to this taxpayer subject to tax was computed as follows:

Assets held 1 to 2 years	(3⅓%)	$1,469.83	80% of profit to be taken into account.	
Assets held 2 to 5 years	(3⅓%)	91,173.60	60% of profit to be taken into account.	
Assets held less than 1 year	(3⅓%)	286,457.06	100% of profit to be taken into account.	
Aggregate proceeds received by both Trusts from sale		$379,100.49		
Cost Base		248,460.48		
Gains on Sale		$130,640.01		
One-half of gain to Trust for Ruth H. Cowen				$65,320.01
One-half of gain to Trust for Virginia H. Berg				65,320.00
				$130,640.01

Percentage for application of limitation section 117 (a) of the 1936 Act:

Period Held	Percentage to be Applied to Net Profit		Total Net Profit on Sale Each Trust Separate		Profit Applicable to each Period of Ownership	Percentage Subject to Tax	Profit Subject to Tax
1 to 2 years	$1,469.83 / 379,100.49	×	$65,320.01	=	$253.26	80%	$202.61
2 to 5 years	91,173.60 / 379,100.49	×	65,320.01	=	15,709.45	60%	9,425.67
Less than 1 year	286,457.06 / 379,100.49	×	65,320.01	=	49,357.30	100%	49,357.30
					$65,320.01		$58,985.58
Profit previously included in income							65,320.01
Adjustment							$6,334.43

These figures and calculations were reflected in the revised schedules of the Treasury Department, Office of the Internal Revenue Agent in Charge, March 23, 1939.

A waiver assenting to the assessment and collection of the tax of $5,691.46 was filed by the trust for Ruth H. Cowen February 2, 1939.

8. Plaintiffs on April 5, 1939, pursuant to the above mentioned revised schedules and waiver paid to the Collector $5,691.46, on account of additional taxes demanded, plus the sum of $667.61, as interest for the period March 15, 1937, to March 1, 1939, totaling $6,359.07.

9. Thereafter, July 8, 1940, within the time allowed by law, plaintiffs filed with the Collector a claim for the refund of the $6,359.07 paid by plaintiffs, as set forth in the next preceding paragraph, together with legal interest thereon from March 30, 1939. More than six months at the time the petition was filed had elapsed since the plaintiffs herein filed their claim for refund and the Commissioner had not advised plaintiffs of any action thereon. June 14, 1941, plaintiffs were advised by registered mail that the claim had been disallowed and no part of the amount herein sought to be recovered has been refunded to the plaintiffs.

10. Plaintiffs' above mentioned claim for refund set forth that the taxpayers had sold or exchanged their partnership interest in E. A. Pierce & Co. December 31, 1936, said partnership interest being one of the assets of the estate of Clarence J. Housman, deceased, who died November 13, 1932; that the executors of said estate had continued this interest in the partnership until August 1, 1936, when they transferred one-half thereof to plaintiffs, pursuant to the terms of the testator's will, and that plaintiffs had continued to hold said partnership interest until the sale thereof on December 31, 1936; that the taxpaying trustees had reported only 60% of the gain realized upon the sale of said partnership interest in its return for 1936, pursuant to section 117 A and B of the Revenue Act of 1936, inasmuch as said interest had been held as a capital asset for more than two, but for not more than five years; the Collector of Internal Revenue maintained that the tax due under section 117 (a) and (b) of the Revenue Act of 1936 from the plaintiff-taxpayers was determined by and measured from the date of acquisition by and the date of disposal by the partnership of E. A. Pierce & Co. of the specific assets belonging to the partnership of E. A. Pierce & Co., in which plaintiffs herein, it was claimed, owned a pro rata interest.

The court decided that the plaintiffs were not entitled to recover, in an opinion *per curiam*, as follows:

The facts in this case and the question presented therein are identical with the facts and question presented in the

case of these plaintiffs, as trustees, under the trust for Virginia H. Berg, No. 45470.

Upon the authorities there cited and discussed, and for the reasons therein stated, the plaintiffs are not entitled to recover in this case. The petition is therefore dismissed. It is so ordered.

SELMA L. SCHUBRING v. THE UNITED STATES

[No. 45517. Decided October 5, 1942]

On the Proofs

Income tax; account stated; timely claim for refund not filed.—Where on November 2, 1938, the Commissioner of Internal Revenue in a letter to plaintiff stated that a review of plaintiff's income tax return for the taxable year 1935 resulted in an overassessment of $739.18, as shown by statement attached to said letter, and that the overassessment indicated would be made the subject of a certificate of overassessment which would reach plaintiff in due course; and where plaintiff did not file a timely claim for refund; and where on December 2, 1938, the Commissioner by letter notified plaintiff that her tax liability for 1935 was still under consideration and that, pending final determination, it was possible her income tax for 1935 would be adjusted so as to disclose a deficiency in said tax; it is *held* that the Commissioner's letter of November 2, 1938, did not constitute an account stated giving rise to a promise implied in fact and plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. Arnold R. Petersen for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff sues to recover $739.18 with interest from December 8, 1936, overpayment of income tax for 1935.

The defendant refused in 1940 to refund the overpayment when demanded September 19 and 24, 1940, on the ground that it was barred by the statute of limitation on refunds. The suit is based on an alleged implied agreement arising from an alleged account stated, and the defendant contends

that there was no account stated which gave rise to an agreement implied in fact to pay the overpayment within the statutory period of limitation.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff and E. J. B. Schubring, her husband, were at all times hereinafter referred to, citizens of the United States of America, residing in Madison, Wisconsin.

2. March 13, 1928, The Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, issued to E. J. B. Schubring five $10,000.00 single payment ten-year endowment policies, numbered respectively 1823333 to 1823337, both inclusive. All of these policies were identical as to form, substance, and maturity. A copy of one of the policies is in evidence as Exhibit A, and made a part hereof by reference.

3. The policies had a cost basis to Mr. Schubring of $36,-797.85. At the time the policies were issued a provision reading as follows was written into each policy:

> By request of the insured, settlement of the full proceeds of this policy shall be made with Selma L. Schubring, the beneficiary, in accordance with the provisions of Option C, 120 stipulated monthly installments, without privilege of commutation. The stipulated installments beginning with the second will be increased by such dividends as may be apportioned by the Company.

March 28, 1935, Mr. Schubring elected to have payment of the proceeds of the policies paid in accordance with the provisions of Option C, and designated himself and his wife as beneficiaries, share and share alike, or to the survivor. The following settlement clause was endorsed upon each policy:

> May 15, 1935. Edward J. B. Schubring, the insured, has survived the endowment period and on his nomination is designated beneficiary together with Selma L. Schubring, wife, share and share alike, or the survivor. Settlement of the respective shares of the herein designated beneficiaries in the aggregate proceeds of this policy and policies Nos. 1823333, 1823334, 1823336 and 1823337, collectively, $50,000, shall be made in accordance with the provisions of Option C, 120 stipulated

monthly installments, without privilege of commutation, the first of such installments being due May 15, 1935. In event of the death of either beneficiary settlement of the share of such deceased shall be continued with the survivor under Option C in accordance with its terms as to the stipulated installments remaining unpaid, if any, without privilege of commutation. The second and subsequent stipulated installments under Option C will be subject to increase by such dividends as may be apportioned by the Company. Edward J. B. Schubring waives the right to change or revoke the foregoing.

4. March 13, 1936, the plaintiff filed with the Collector of Internal Revenue at Milwaukee, Wisconsin, her individual income tax return for 1935, disclosing a tax liability of $1,217.11. The tax liability disclosed thereon was paid in installments in 1936, as follows: $304.28 March 16, 1936; $304.28 June 3, 1936; $304.28 September 10, 1936, and $304.27 December 10, 1936.

5. E. J. B. Schubring filed an individual income tax return for 1935, with the Collector of Internal Revenue at Milwaukee, Wisconsin, March 13, 1936.

6. Plaintiff included in income under Item 6 of her return the sum of $6,601.08, representing one-half of the difference between the cost and the face value of the above-mentioned endowment policies. Mr. Schubring included in income under Item 7 of his return the sum of $6,601.07, representing the other half of the difference between the cost and the face value of the policies.

7. The above-mentioned endowment policies matured May 15, 1935. In 1935, plaintiff received installment payments aggregating $1,122.00 under these policies and received various sums from annuity policies. Plaintiff included in gross income under Item 11 of her return the sum of $2,307.07, representing 3% of the cost of the various endowment and annuity policies. Included in this amount was the sum of $421.87, representing 3% for six and three fourth months of one-half of the face value of the endowment policies.

8. By letter of February 10, 1938, plaintiff was notified of a proposed deficiency in income tax for the year 1935 in *the amount of $3,672.73. This letter was as follows:*

> A review of the report submitted by the internal revenue agent in charge, Milwaukee, Wisconsin, cover-

> ing your income tax liability for the taxable year ended December 31, 1935, discloses a deficiency of $3,672.73, as set forth in the statement attached.
>
> If you agree to the determination of your tax liability, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:D1:MFB. The signing of this form will permit a prompt assessment of the deficiency and thus prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

The proposed deficiency resulted from increasing to $25,000.00 plaintiff's profit in connection with the maturity of the above-mentioned policies.

9. Plaintiff, through her attorney, Arnold R. Petersen, filed a timely protest against the proposed deficiency. Thereafter, a conference was held at the office of the Internal Revenue Agent in Charge at Milwaukee, August 11, 1938. August 17, 1938, plaintiff's attorney filed a supplemental protest against the proposed deficiency, asserting that the deficiency should be canceled and that the tax paid in respect of the sum of $6,601.08 should be refunded. A copy of the supplemental protest is in evidence as Exhibit E, and made a part hereof by reference. This protest was in part as follows:

> The present law, as well as the law in force at the time the policies in question matured, expressly provides that there shall be no tax until the cost of the insurance or annuity has been returned, Sec. 22 (b) (2); see also C. C. C. Tax Service Vol. I, paragraph 95, Art. 22 (b) (2)-2 (Reg. 94), and the beneficiary as well as the insured is entitled to deductions until the cost has been returned. See C. C. C. Tax Service 94.03.
>
> I therefore submit that under the law neither Mr. Schubring nor Mrs. Schubring is liable for any tax on these annuity payments until they have received back the cost of the insurance. I can find nothing in any of the authorities which would justify your interpretation of taxing the whole of Mrs. Schubring's interest in a lump sum. Under the law as it exists, the deficiency against Mrs. Schubring should be canceled. Not only that, but Mrs. Schubring should have a refund for the amount of the tax she has paid on her 1935 returns on the sum of

$6,601.08; likewise Mr. Schubring should have a refund of the tax on the sum of $6,601.07 that he included in his 1935 returns, although we may have to file a claim for this.

10. By letter of November 2, 1938, E. J. B. Schubring was notified of a proposed deficiency in income tax for the year 1935 in the amount of $1,981.47. A copy of this letter is in evidence as Exhibit F, and made a part hereof by reference. This deficiency was based upon a determination that Mr. Schubring was taxable on the sum of $13,202.15, representing the entire difference between the cost and face value of the above-mentioned insurance policies, and that no taxable profit was realized by Mrs. Schubring in connection with the maturity of the policies.

11. By letter of November 2, 1938, plaintiff was informed that the sum of $6,601.08 reported in her return had been eliminated, resulting in an overassessment of $739.18, and that a certificate of overassessment would reach her in due course.

This letter from the Commissioner and the statement thereto attached were as follows:

> Further reference is made to a review of your individual income tax liability for the taxable year ended December 31, 1935, in connection with a report of the internal revenue agent in charge at Milwaukee, Wisconsin, as set forth in Bureau letter dated February 10, 1938, in which it was disclosed that there was a deficiency in tax in the amount of $3,672.73.
>
> The tax in question resulted from increasing the profit reported of $6,601.08 to $25,000.00 in connection with the maturity proceeds of certain endowment policies.
>
> After careful consideration of the information shown in your protest dated August 16, 1938, and the facts as presented at a conference held in the office of the internal revenue agent in charge, August 11, 1938, your contention that no profit was realized by you in connection with the maturity of endowment policies has been allowed. Accordingly, the amount of $6,601.08 reported in your return as originally filed, as profit realized from the maturity of the above-mentioned insurance policies, has been eliminated. This adjustment results in an overassessment of $739.18 as shown in the attached statement.

The overassessment indicated above will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district and will be applied by that official in accordance with section 322 of the Revenue Act of 1934.

STATEMENT

Net income reported in return	$14, 665. 84
Less: Profit reported from maturity of insurance policies	6, 601. 08
Total	8, 064. 76
Plus: Annuity income increase	78. 01
Net income adjusted	8, 142. 77
Less: Earned income credit	300. 00
Income subject to normal tax	7, 842. 77
Normal tax at 4% on $7,842.77	313. 71
Surtax on $8,142.77	188. 57
Total	502. 28
Less: Income tax paid at source	24. 35
Tax liability	477. 93
Tax assessed: Account #200838	1, 217. 11
Overassessment	739. 18

12. November 20, 1938, Mr. Schubring, through his attorney, Arnold R. Petersen, filed a timely protest against the proposed deficiency of $1,981.47, in which it was asserted that the deficiency should be canceled and that Mr. Schubring should have a refund of the tax paid in respect of the above-mentioned item of $6,601.07.

13. By letter of December 2, 1938, Mr. Schubring was notified that the period within which any refund might be made would soon elapse, and it was suggested that he protect his rights in the matter of any overassessment by filing a claim for refund. A copy of this letter is in evidence and states as follows:

> This office has under consideration your individual income-tax liability for the taxable year ended De-

cember 31, 1935, in connection with a report submitted by the internal-revenue agent in charge at Milwaukee, Wisconsin.

It is noted that it is your contention that the income as reported in the return should be decreased by the amount of income included as taxable in connection with the maturity of certain insurance policies.

Relative to any overassessment which might be due, your attention is invited to section 322 (b) (1) of the Revenue Act of 1934 which limits the making of a refund or credit to within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid. Inasmuch as this limitation will shortly expire, it is suggested that you protect your rights in the matter of any overassessment by preparing and filing a claim upon the enclosed form 843. The claim should set forth in detail the grounds or basis of the apparent overassessment. The claim should be properly signed and sworn to by a duly authorized person under a notary public (or other officer authorized to administer oaths for general purposes), and be filed immediately with the collector of internal revenue for the district in which the tax was paid.

14. By letter of December 2, 1938, plaintiff was advised that final determination of her tax liability and that of Mr. Schubring in connection with the maturity of the abovementioned insurance policies might result in a deficiency in her tax for the year 1935, and that for this reason it was not practicable to close the case by the issuance of a certificate of overassessment. Plaintiff was further notified that the period of limitation for assessment for the year 1935 would expire shortly, and was requested to execute a consent extending the period of limitation upon assessment for the year 1935 to June 30, 1940. A copy of this letter is in evidence and reads as follows:

This office has under consideration your income-tax return for the taxable year ended December 31, 1935, in connection with a report submitted by the internal-revenue agent in charge at Milwaukee, Wisconsin.

You are advised that pending final determination of the taxability of income reported by you and your husband as being received in connection with the maturity of certain insurance policies for the year under

consideration, it is possible that your income would be adjusted to disclose a deficiency in tax.

It is desired to bring to your attention the fact that the statutory period within which a final notice of deficiency may be issued for the taxable year ended December 31, 1935, will expire at an early date.

You are advised, however, that a taxpayer has the right under the provisions of the revenue acts to make application for the execution of a consent extending the period of limitation for assessment. There is a possibility that the case cannot be adequately considered by the Bureau before the expiration of a statutory period and for that reason it is not practicable to close the case by the issuance of a certificate of overassessment as shown in Bureau letter dated November 2, 1938, in view of the fact that the final adjustment might result in a deficiency for the year in question.

If, therefore, you elect to execute the consent form enclosed, please forward in triplicate, properly signed to the Commissioner of Internal Revenue, Washington, D. C. Otherwise, it will be necessary to prepare and issue a final notice of deficiency.

Please reply within ten days from the date of this letter making reference to the symbols IT: D: 1-MFB.

15. By letter of December 6, 1938, plaintiff's attorney replied to the letter addressed to Mrs. Schubring under date of December 2, 1938, by calling attention to the determination made by the Deputy Commissioner in his letter addressed to the plaintiff under date of November 2, 1938. A copy of this letter is in evidence and states as follows:

I am returning herewith in triplicate form #872, executed by me as attorney for Mrs. Selma L. Schubring. The protest was filed in this matter some time ago, together with a power of attorney in which I was given specific authority to sign extensions.

I was rather surprised to get your letter of December 2, 1938, in the above matter, in view of your report of November 2, 1938. In your letter of December 2, 1938, you speak of the final determination of Mrs. Schubring's 1935 tax liability under her 1935 tax report, as pending. We call your attention to your report of November 2, 1938, in which you state: "After careful consideration of the information shown in your protest dated August 16, 1938, and the facts as presented at a conference held in the office of the internal revenue

agent in charge, August 11, 1938, your contention that no profit was realized by you in connection with the maturity of endowment policies has been allowed. Accordingly, the amount of $6,601.08 reported in your return as originally filed, as profit realized from the maturity of the above-mentioned insurance policies, has been eliminated. This adjustment results in an overassessment of $739.18 as shown in the attached statement."

The last paragraph of this letter states that a certificate of overassessment will reach Mrs. Schubring in due course. That seems very final to me. About the same time that you mailed to Mrs. Schubring your letter and report of November 2, 1938, you also mailed to Mr. Schubring a letter and report bearing the same numbers as above, and in this letter, addressed to Mr. Schubring, you assessed the $6,601.08 that you dropped from Mrs. Schubring's tax report, to Mr. Schubring, and notified him of a deficiency of $1,981.47. We filed a protest on this deficiency, and the same is now pending.

As I interpret the proceedings so far in this matter, it looks to me as though the Commissioner of Internal Revenue has determined that there is a liability, but cannot decide where the liability should rest. Certainly it cannot be possible that this is the first time that this question has been raised before the Commissioner of Internal Revenue. In view of the uncertainty indicated in the action taken by the Commissioner, in both Mr. and Mrs. Schubring's 1935 returns, it seems to us that the case is one which properly should go before the Board of Tax Appeals. In this connection I might say that we are sending in today to the Milwaukee office, on behalf of Mr. Schubring, a claim for refund of $1,766.42, arising out of the inclusion of a similar item of $6,601.07 in Mr. Schubring's 1935 return. Under the decisions involving the question here involved, I am satisfied that there is no question as to Mr. Schubring's right to a refund and there is no question but what the determination contained in the report of the Treasury Department of November 2, 1938, to Mrs. Schubring, is correct, and it might be well to have a definite precedent from the Board of Tax Appeals.

As we have stated in our protest, heretofore filed with the Commissioner, the insurance policies involved in this case come squarely within the rule laid down that no part of the proceeds of a policy, other than the annual 3% of the cost, is taxable until after the total cost of

the policy has been returned. There are cases in favor of the taxability of the proceeds but if you will examine those cases, you will find in each instance that they relate to cases where the full amount of the policy was payable at the end of the endowment period, and instead of taking the lump sum payment, the beneficiaries elected to leave the money with the insurance company and receive payment in monthly installments; in other words, in those cases the beneficiary constructively received the proceeds of the policy and turned around and purchased an annuity. That is not our case. If you will look through the policy, you will find that from the time these policies were issued, the policies were payable in 120 monthly installments, and the election of the settlement provision by the insured even goes so far as to provide that the monthly payments provision is without right of commutation. In other words, the beneficiary could not settle on a lump-sum basis when the policy matured.

In March of 1935, Mr. Schubring exercised his reserved right to change the beneficiary, by making himself a co-beneficiary, but the terms of settlement were not changed. The mode of settlement still remained the payment of 120 monthly installments without the right of commutation. This mode of settlement has existed from the time the contract was originally entered into, and for the Commissioner to hold that in this case there was a constructive receipt of the proceeds of the endowment policies and a purchase of an annuity, is finding something contrary to the express terms of the contract and contrary to the facts as they exist.

16. Plaintiff, through her attorney, executed in triplicate a consent extending the period of limitation for assessment for 1935 to July 30, 1940. This consent was accepted in behalf of the Commissioner on December 17, 1938.

17. December 8, 1938, Mr. Schubring filed with the Collector of Internal Revenue at Milwaukee a formal claim for refund for 1935 in the amount of $1,766.42, asserting that he had erroneously included in income the above-mentioned item of $6,601.07.

18. May 10, 1939, the Internal Revenue Agent in Charge at Milwaukee addressed a letter to Mr. and Mrs. Schubring's attorney enclosing corrected agreement forms for both Mr. and Mrs. Schubring, which set forth a deficiency of $1,981.47

against Mr. Schubring and an overassessment of $739.18 in favor of the plaintiff.

Mr. A. R. PETERSEN,
The Power & Light Building,
Madison, Wisconsin.

In re: Mr. E. J. B. Schubring, Mrs. Selma L. Schubring, 410 North Pinckney Street, Madison, Wisconsin.

DEAR SIR: In my letters of February 10, 1939, to the above-named, it was stated that the protests of November 18, 1938, had been carefully considered but appeared to furnish no grounds for a modification of the proposed adjustments. Enclosed with said letters were agreement forms indicating a deficiency against Mr. E. J. B. Schubring for the year 1935 of $1.981.47 and against Mrs. Selma L. Schubring a deficiency of $3,672.73. You are advised that the agreement prepared in the case of Mrs. Schubring and attached letter of February 10, 1939, was in error. The recommendation which this office submitted to the Bureau at Washington was for the assertion of a deficiency of $1,981.47 against Mr. Schubring and an overassessment of $739.18 in the case of Mrs. Schubring.

In view of the foregoing, I enclose herewith corrected agreement forms for both Mr. and Mrs. Schubring and in the event it is decided to acquiesce in the adjustments proposed, please have the same properly executed and returned to this office.

Should you desire to have this matter referred to the Technical Staff of the Bureau of Internal Revenue, 733 Wells Building, Milwaukee, Wisconsin, for hearing by that office prior to the issuance of the final notice of deficiency, arrangement will be made accordingly upon your written request. Otherwise, unless the taxpayers should either pay the deficiency in tax to the Collector of Internal Revenue or execute and file with this office the forms of agreement enclosed with this letter, final determination of tax liability will be made and a notice of deficiency will be set in accordance with the provisions of law applicable to the assessment and collection of tax deficiencies.

In case you request a hearing by the Technical Staff, your request will be referred to that office which will communicate with you regarding the matter. You are advised, however, that the Technical Staff will not consider substantial issues or important evidence unless previously presented to this office.

An additional period of ten days from the date of this letter will be allowed for such action as you may wish to take prior to the issuance of the statutory notice.

Respectfully,

D. W. REYNOLDS (Signed),
Internal Revenue Agent in Charge.

19. May 11, 1939, plaintiff's attorney executed the agreement Form 873 in behalf of Mrs. Schubring, accepting the proposed overassessment of $739.18. This form was received in the Internal Revenue Agent's office on May 12, 1939.

This executed Form 873 is set forth below:

Collection District: Wisconsin

MRS SELMA L. SCHUBRING,
Madison, Wisconsin.

Form 873.

TREASURY DEPARTMENT,
Internal Revenue Service
Revised February 1938.

ACCEPTANCE OF PROPOSED OVERASSESSMENT

____

The following overassessment or overassessments of tax are hereby accepted as correct:

taxable year ended Dec. 31, 1935 income tax in the sum of__ $739.18
taxable year ended____________income tax in the sum of___ $______
taxable year ended____________excess-profits tax in the sum of____ $ XX

taxable year ended____________in the sum of______________ $______
amounting to the total sum of____________________________ $739.18
as indicated in the statement furnished the undersigned taxpayer(s) under date of____________.

MRS. SELMA L. SCHUBRING,
410 North Pinckney St., Madison, Wis.
By ARNOLD R. PETERSEN,
The Power & Light Bldg.,
Madison, Wis., her attorney in fact.

Date: May 11, 1939.

NOTE.—The execution and filing of this acceptance at the address shown in the accompanying letter will expedite the indicated adjustment of your tax liability. This acceptance is subject to the approval of the Commissioner and is not an agreement as provided under Section 606 of the Revenue Act of 1928.

This Form 873 was never approved by the Commissioner of Internal Revenue.

20. Mr. Schubring did not execute Form 870 for the waiver of restrictions on assessment and collection of a deficiency in tax for 1935 in the amount of $1,981.47, which was enclosed in the letter of May 10, 1939.

21. By letter of December 27, 1939, Mr. Schubring was notified of a deficiency in income tax for the year 1935 in the amount of $1,981.47, based upon a determination that he was taxable on the total difference between the cost and the face value of the above-mentioned insurance policies. A copy of the deficiency notice is in evidence as Exhibit O, and made a part hereof by reference.

22. March 22, 1940, Mr. Schubring filed with the United States Board of Tax Appeals a petition for a redetermination of his income tax liability for 1935.

23. Mr. Schubring's appeal to the Board of Tax Appeals was settled upon stipulation of the parties that there was an overassessment of $1,766.42. November 22, 1940, the Board of Tax Appeals entered its order finding an overpayment in income tax for the year 1935 in the amount of $1,766.42.

24. September 19, 1940, plaintiff's attorney addressed a letter to the Collector of Internal Revenue inquiring as to the cause of the delay in paying to the plaintiff the refund of $739.18. This letter was as follows:

COLLECTOR OF INTERNAL REVENUE,
547 Federal Bldg., Milwaukee, Wisconsin.

Attention—Mr. D. W. Reynolds.

In re: Your File No. RA: C: JJS. Mr. E. J. B. Schubring, Mrs. Selma L. Schubring, 410 N. Pinckney St., Madison, Wisconsin.

DEAR SIR: Your letter to me dated May 10, 1939, confirmed the decision of the Commissioner as to overassessment against Mrs. E. J. B. Schubring of $739.18, and I executed a stipulation agreeing as to the amount of the overassessment. Considerable more than a year has now elapsed, and Mrs. Schubring has never received this refund. I was wondering what is now causing the delay in this matter.

There is pending an appeal by Mr. E. J. B. Schubring, husband of Mrs. Selma L. Schubring, from a deficiency assessment in the amount of $1,981.47, and there is also pending a claim for refund by Mr. Schubring in the amount of $1,766.42, all of which arises out of the 1935 income return of Mr. Schubring. These matters will be heard by the Board of Tax Appeals in Milwaukee this coming November, but we can see no reason why that should hold up disposition of the overassessment against Mrs. Schubring.

I would appreciate your advising me of the cause of this delay.

Yours very truly,

ARNOLD R. PETERSEN
Attorney-in-fact.

25. September 21, 1940, the Revenue Agent in Charge addressed a letter to plaintiff's attorney stating that any refund was barred by the statute of limitations.

This letter was as follows:

Mr. ARNOLD R. PETERSEN,
The Power & Light Building,
Madison, Wisconsin.

In Re: Mr. E. J. B. Schubring and Mrs. Selma L. Schubring, Madison, Wisconsin.

DEAR SIR: Receipt is acknowledged of your several letters of September 19, 1940, and September 20, 1940, regarding the cases of the above named. Your letters requesting certified or photostatic copies of the returns filed by Mr. Schubring and the 1935 return of Mrs. Schubring have been referred to the Technical Staff, Chicago, Illinois, for appropriate reply. Any further correspondence with respect to these returns or claims should be addressed to Mr. Milton E. Carter, Head, Technical Staff, 1300 Board of Trade Building, Chicago, Illinois.

In one of your letters of September 19, 1940, you request information regarding the disposition of the claim for refund of Mrs. Selma L. Schubring for the year 1935 in the amount of $739.18. In this connection you are informed that while this office recommended an overassessment of $739.18, upon reference of the files to the Technical Staff the recommendation was overruled in view of the fact that Mrs. Schubring had failed to file a claim for refund within the statutory

time. Section 322 (b) (1) of the 1934 Revenue Act provides that no credit or refund of taxes shall be allowed unless a claim therefor is filed within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires the later. Mrs. Schubring's return for 1935 was filed on March 13, 1936, and even if the tax was paid in quarterly installments the last payment was apparently made not later than December 15, 1936.

At the time of its consideration of the case in December 1939, the Technical Staff found that no claim had been filed by Mrs. Schubring, and accordingly it was concluded that any refund of tax for the year 1935 was barred by the Statute of Limitation in accordance with the provisions of Section 322 (b) (1) of the Revenue Act of 1934.

Respectfully,

D. W. REYNOLDS (Signed),
Internal Revenue Agent in Charge.

26. September 24, 1940, plaintiff's attorney replied to the letter of September 21, 1940, as follows:

COLLECTOR OF INTERNAL REVENUE,
547 Federal Building,
Milwaukee, Wisconsin.

Attention of Mr. R. W. Reynolds.

DEAR SIR: I received your letter of the 21st inst. in re above matter.

I believe you have overlooked some material facts. It is true that after we had filed a supplemental protest in Mrs. Schubring's behalf, and under date of September 1, 1938, you wrote to Mrs. Schubring a letter stating that "after thorough consideration, this office cannot agree with your contentions. Accordingly, your case is being transmitted to the Bureau for further and final review."

Under date of November 2, 1938, two months after your letter to Mrs. Schubring, Mrs. Schubring received a letter and report direct from Washington and signed by L. M. Simpson in which it is stated "After careful consideration of the information shown in your protest dated August 16, 1938, and the facts as presented at a conference held in the office of the internal revenue agent in charge, August 11, 1938, your contention that no profit was realized by you in connection with the maturity of endowment policies has been

allowed. Accordingly, the amount of $6,601.08 reported in your return as originally filed, as profit realized from the maturity of the above-mentioned insurance policies, has been eliminated. This adjustment results in an overassessment of $739.18 as shown in the attached statement. The overassessment indicated above will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district and will be applied by that official in accordance with section 322 of the Revenue Act of 1934."

I call your attention to the fact that this letter and the accompanying report finding the overassessment was two months after you had submitted the matter to Washington. Your letter of the 21st inst. does not take into consideration the fact that the Commissioner at Washington had expressly informed Mrs. Schubring that the amount of $6,601.08 had been eliminated, and that the certificate of overassessment would reach us in due course. We have relied upon the letter from Washington of November 2, 1938; and in view of the information contained in that letter, there was no sense in our filing any claim for a refund, because the filing of a claim for a refund could accomplish nothing more than the Commissioner had already allowed in his letter of November 2, 1938.

I call your attention to the fact the letter of November 2, 1938, was still well within the three year period in which we could have filed a claim for a refund, and would have filed a claim for a refund, except for the letter of November 2, 1938.

I did file a claim for a refund in Mr. Schubring's case because in his case the Commissioner never conceded that he was entitled to a refund.

I trust that you will check your files again on this matter and let us know in the very near future, because we relied upon the letter from Washington dated November 2, 1938, and for that reason filed no claim for a refund. I do not believe that the Commissioner of Internal Revenue intended to mislead us, and I still believe that your letter of the 21st inst. was written without having in mind the letter of the Commissioner at Washington dated November 2, 1938.

Yours truly,

ARNOLD R. PETERSEN.

27. By letter, September 30, 1940, the Internal Revenue Agent in Charge advised plaintiff as follows:

Mr. ARNOLD R. PETERSEN,
Attorney-at-Law,
The Power & Light Building,
Madison, Wisconsin.

In Re: Mr. E. J. B. Schubring, Mrs. Selma L. Schubring, Madison, Wisconsin.

DEAR SIR: Receipt is acknowledged of your letter of September 24, 1940, in further reference to the cases of the above-named.

The record discloses that the Bureau at Washington issued a preliminary notice to Mrs. Selma L. Schubring under date of November 2, 1938, wherein she was advised that there was an apparent overassessment of $739.18 for the year 1935. In its letter, the Bureau states "The overassessment indicated above will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322 of the Revenue Act of 1934."

The certificate of overassessment referred to in the Bureau letter was not issued. Apparently, further action on the case of Mrs. Schubring was withheld pending settlement of the case of Mr. E. J. B. Schubring. Both of these cases involved the issue relating to the maturity proceeds of certain endowment insurance policies, and the closing effected in one case might result in adjustments in the other case. Generally, it has been the Bureau's policy in related cases of this nature, to withhold issuance of a certificate of overassessment until such time as a definite determination has been made of the deficiency in the other case.

It has been held that where the Commissioner advises a taxpayer of an overpayment of taxes, but later changes his opinion and does not issue a Certificate of overassessment, it is not an "account stated" and the Government is not bound. See *Corinne Griffith Marshall* v. *U. S.* 26 Fed. Supp. 474 (Certiorari denied.) It has also been held in several decisions that on delivery to taxpayer of a certificate of overassessment there arises a cause of action pleaded in account for money due on "account stated" which is not barred by revised statutes, Sec. 3226, as amended, although begun

after period of limitation therein specified. *Bonwit Teller and Company* v. *United States*, 283 U. S. 258; *United States* v. *Kaufman*, 96 U. S. 567.

In view of the foregoing, and in accordance with the provisions of section 322 of the Revenue Act of 1934, the Commissioner is without authority in law to issue a certificate of overassessment at this time, inasmuch as a claim for refund was not filed by Mrs. Schubring within the statutory period.

Respectfully,

D. W. REYNOLDS,
Internal Revenue Agent in Charge.

28. The Commissioner of Internal Revenue has never allowed any overassessment or overpayment in respect of plaintiff's tax for 1935, as the term "allowed" is used in the taxing statute, and the only action which the Commissioner has ever taken with respect to plaintiff's tax liability for 1935 is that set forth in the letters of November 2, 1938, (finding 12), and December 2, 1938 (finding 14).

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts essential to the decision as to plaintiff's right to recover show that, in March 1928, plaintiff's husband purchased five $10,000 single payment ten-year endowment policies, all of which matured May 15, 1935. At the time the policies were issued, each of them was by a special endorsement made payable to plaintiff in monthly installments. The policies were issued with reservation to plaintiff's husband, as the insured, to change the beneficiary. He exercised this right on March 28, 1935, and, in conformity therewith, designated himself and his wife, the plaintiff, as the beneficiaries thereunder, share and share alike. Said policies, totaling $50,000, were to be paid in monthly installments. The difference between the face amount of the policies of $50,000 and the cost thereof, was $13,202.15.

Plaintiff and her husband filed separate returns for 1935, in March 1936, each reporting $6,601.08, representing one-half of the difference between the face value of the policies and the cost thereof. February 10, 1938, the Commissioner

of Internal Revenue notified plaintiff of a proposed deficiency for 1935 of $3,672.73, which was arrived at by considering as taxable income to her the full one-half of the face of the insurance policies, namely $25,000, from which was deducted the $6,601.08 reported. This increased plaintiff's income by $18,398.92. The plaintiff, through her attorney-in-fact, protested against the proposed deficiency and later on, August 17, 1938, filed a supplemental protest against the proposed deficiency, asserting that it should be canceled, and stating "I can find nothing in any of the authorities which would justify your interpretation of taxing the whole of Mrs. Schubring's interest in a lump sum. Under the law, as it exists, the deficiency against Mrs. Schubring should be canceled. Not only that, but Mrs. Schubring should have a refund for the amount of the tax she has paid on her 1935 returns on the sum of $6,601.08; likewise, Mr. Schubring should have a refund of the tax on the sum of $6,601.07 that he included in his 1935 returns, although we may have to file a claim for this." No claim for refund was ever filed by or on behalf of plaintiff, but a formal claim for refund was filed by her husband and a refund was subsequently made to him.

November 2, 1938, the Commissioner of Internal Revenue wrote plaintiff a letter, which is set forth in finding 11. This letter, in order to bring about an allowance of an overassessment, overpayment, or refund was to be followed by a schedule of overassessment or overpayment. Following the mailing of the above-mentioned letter of November 2, and before anything else was done, the Commissioner on December 2, 1938, mailed plaintiff another letter, which is set forth in finding 14, in which the Commissioner stated, among other things, the following:

> You are advised that pending final determination of the taxability of income reported by you and your husband as being received in connection with the maturity of certain insurance policies for the year under consideration, it is possible that your income would be adjusted to disclose a deficiency in tax.
>
> It is desired to bring to your attention the fact that the statutory period within which a final notice of deficiency may be issued for the taxable year ended December 31, 1935, will expire at an early date.

> You are advised, however, that a taxpayer has the right under the provisions of the revenue acts to make application for the execution of a consent extending the period of limitation for assessment. There is a possibility that the case cannot be adequately considered by the Bureau before the expiration of a statutory period and for that reason it is not practicable to close the case by the issuance of a certificate of overassessment as shown in Bureau letter dated November 2, 1938, in view of the fact that the final adjustment might result in a deficiency for the year in question.

Plaintiff, on December 6, 1938, executed a consent extending the period of limitation within which assessment of any deficiency which might be determined with respect to her tax liability might be assessed, but she did not, then or later, file a claim for refund. Her husband filed a claim for refund for 1935 on December 8, 1938.

The matter of the tax liability of plaintiff and her husband was thereafter kept under consideration by the Commissioner and on December 27, 1939, the Commissioner notified plaintiff's husband of a deficiency in respect of his tax for 1935 of $1,981.47 based on the determination that he was taxable on the total of $13,202.15, representing the difference between the face of the insurance policies and the cost thereof, $6,601.07 of which he had reported in his original return. Pending the final outcome of affirmance or reversal of that determination the Commissioner held plaintiff's tax liability in abeyance.

March 22, 1940, plaintiff's husband filed a petition for redetermination with the United States Board of Tax Appeals in respect to this deficiency. The proceeding before the Board was settled upon a stipulation filed by the parties that there was an overassessment of $1,766.42 in respect of the tax liability of plaintiff's husband. Upon this stipulation the Board entered a decision November 22, 1940, finding an overpayment by plaintiff's husband of $1,766.42.

September 19, 1940, plaintiff, through her attorney in fact wrote a letter to the collector inquiring as to the cause of the delay in paying plaintiff the overassessment of $739.18. Plaintiff was advised on September 21, 24, and 30

that any refund in respect of the tax paid by her for 1935 was barred by the statute of limitation.

Plaintiff in her brief states that "It is the plaintiff's position that the letter of the Commissioner of November 2, 1938, constituted an account stated, agreed to and accepted by the plaintiff, and that under such circumstances the filing of a claim for refund was not necessary." This contention cannot be sustained. All that the Commissioner said in this letter of November 2, was that the allowance of plaintiff's contention that no profit was realized by her in connection with the maturity of the endowment policies resulted in an overassessment. Subsequently, on December 2, 1938, the Commissioner wrote plaintiff concerning her tax liability for 1935, referred to his letter of November 2, 1938, and advised plaintiff in writing that her case was still under consideration and that, pending final determination, it was possible that her income for 1935 would be adjusted so as to disclose a deficiency in tax. (Finding 14.) By this letter of December 2, which was written well within the statutory period of limitation for filing a claim for 1935, the Commissioner clearly told plaintiff that he was not making and could not make at that time a final decision as to an overassessment or overpayment by her for 1935 and that his decision on the matter was being held in abeyance. Plaintiff's letter of December 6, 1938, in reply (Finding 15), shows that she so understood this letter of the Commissioner. Plaintiff should then have protected her right to receive any refund to which she thought herself entitled by filing a claim for refund on or before March 13, 1939. This she did not do. The matter of plaintiff's tax liability was kept open and under consideration by the Commissioner until his determination in respect of the tax liability of plaintiff's husband in connection with the same insurance policies was made and finally decided by the Board on November 22, 1940. In the meantime the Commissioner made no final decision in respect of plaintiff's case. When the decision of the Board was rendered any payment of a refund to plaintiff was barred by the statute of limitation, inasmuch as no claim for refund had been timely filed. There was clearly no ac-

count stated such as would give rise to an implied agreement to pay the $739.18. *Braun* v. *United States*, Cong. No. 17749, decided this day.

Plaintiff's petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JOHN P. MORIARTY, INC. v. THE UNITED STATES

[No. 45599. Decided October 5, 1942]

On Defendant's Motion to Dismiss

Government contract; payment, time for.—In Government contract for purchase of black earth, where nothing was said in contract about the time for payment, it is *held* that payment was due on date of delivery and acceptance.

Same; limitation of actions.—Running of statute of limitations not stopped by consideration of claim by administrative agency. Statute begins to run on date payment was due.

Mr. L. A. Luce for the plaintiff.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues the defendant for the sum of $18,433.30, plus interest, alleged to be due on account of the purchase from the plaintiff by the defendant of 14,746.64 cubic yards of black earth. The defendant has filed a motion to dismiss the petition on the ground that the petition was filed more than six years after the cause of action accrued.

The petition alleges that in the month of December 1933 the plaintiff entered into a contract with the defendant to furnish it black earth at a certain rate per cubic yard and that in pursuance thereto it delivered to the defendant 14,746.64 cubic yards of black earth during the months of December 1933 and January and February 1934, and that said earth was duly approved and accepted by the defendant.

Nothing was said in the contract about the time for payment; therefore, unless there is something unusual about this

particular contract, the time for payment was on the date of delivery and acceptance of the earth by the defendant. *Guarantee Title & Trust Co.* v. *First National Bank of Huntingdon, Pa., et al.*, 185 Fed. 373 (C. C. A. 3); *Pond Creek Mill & Elevator Co.* v. *Clark*, 270 Fed. 482 (C. C. A. 7); Williston on Sales (2d Ed.), pp. 1104 *et seq; Bradford, etc., R. Co.* v. *New York, etc., R. Co.*, 123 N. Y. 316; 11 L. R. A. 116. *Chapman* v. *Lathrop*, 6 Cow. (N. Y.) 110. See note 62 L. R. A. 805. This suit was filed December 18, 1941, more than six years thereafter. The plaintiff says that this general rule does not apply in this case because its cause of action did not accrue "until plaintiff's claim had been determined, approved, or disapproved by a designated agency of the United States, namely, the Federal Civil Works Administration * * *."

As authority for its position it cites *Globe Indemnity Co.* v. *United States*, 291 U. S. 476; *Farmers Cotton Oil Co.* v. *United States*, 84 C. Cls. 468, 474; *Pink, Liquidator* v. *United States*, 85 C. Cls. 121, 124; *Cohen, Goldman & Co., Inc.*, v. *United States*, 77 C. Cls. 713; *Penn Bridge Co.* v. *United States*, 71 C. Cls. 273.

The plaintiff has filed rules and regulations of the Federal Civil Works Administration and also certain pages of the Manual of Financial Procedure, Accounting, and Reporting for State and Local Civil Works Administrations, but there is nothing in any of them which prohibits the plaintiff from bringing suit until after its claim had been passed upon by the administrative agency. It would be astonishing if they did, since in such case the defendant merely by indefinitely postponing action upon a claim could defeat its payment.

Globe Indemnity Company v. *United States*, *supra*, is not in point. The question there was the date a cause of action accrued under a statute providing for the commencement of suits by subcontractors "within one year after the performance and final settlement of the said contract and not later." We have no such statute here.

In *Penn Bridge Co.* v. *United States*, *supra*, it was held that the cause of action for increased wages paid plaintiff's employees did not accrue until the claim had been determined and approved by the Bureau of Yards and

Docks, but this was under a contract expressly providing that before plaintiff should be entitled to recover for increased wages paid, its claim should be determined and approved by the Navy Department, Bureau of Yards and Docks. This is not the case here.

The case of *Farmers Cotton Oil Co.* v. *United States*, *supra*, is not in point.

The cases of *Cohen, Goldman & Co., Inc.* v. *United States*, *supra*, and *Pink, Liquidator*, v. *United States*, *supra*, instead of supporting plaintiff's position, are authorities against it. In the *Cohen, Goldman & Co.* case, p. 730, after having stated that the cause of action accrued upon completion and acceptance of the work, the court said:

> The statute gave plaintiff six years within which to obtain a settlement of its claims in the departments but made it necessary that, if such settlement should not be effected within that time, suit be instituted within the six-year period. This the plaintiff failed to do and the fact that the matter was under consideration by the War Department and the General Accounting Office for a considerable time, during which the Government made certain audits and determinations disallowing plaintiff's claims and the plaintiff made various applications for reopening and reconsideration, did not extend the six-year period within which the plaintiff was required to institute suit. * * *

In *Pink, Liquidator* v. *United States*, *supra*, p. 124, the court said:

> * * * The time is not suspended during the period his claims for reimbursement under the terms of the contract are being considered and passed upon by the Government officials. * * *

The plaintiff in this case was entitled to sue as soon as the earth had been delivered. Of course, no one would elect to bring suit until they were satisfied that their claim was not going to be paid by the administrative agency in question, but the statute fixes a limit on the time plaintiff can delay bringing his suit. That limit is fixed at six years (28 U. S. Code 262.) If before that time plaintiff is unable to obtain action upon his claim by the administrative agency, the statute requires that he protect his rights by filing suit

thereon. This the plaintiff did not do, and its claim, therefore, is barred.

It results that the petition should be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

EASTERN CONTRACTING COMPANY, A CORPORATION v. THE UNITED STATES

[No. 44226. Decided October 5, 1942. Plaintiff's motion for new trial overruled January 4, 1943]

On the Proofs

Government contract; highway approaches to Cape Cod Canal bridge; insufficient proof.—Where plaintiff entered into a contract with the Government to furnish all plant, labor, and material, and to perform all work required for the construction of the highway approaches to the highway bridge over the Cape Cod Canal at Bourne, Massachusetts, and for the reconstruction of the highway passing under the overpass on the north approaches to the Bourne Bridge; and where it is established that plaintiff was delayed in the performance of its work by the operations of other contractors engaged in construction of said bridge and highway; and where extensions of time were granted on account of said delays; and where, upon completion of plaintiff's contract, no liquidated damages were assessed, and the full contract price was paid, including an allowance for extra material used; it is *held* that, while the evidence clearly shows that plaintiff was damaged by reason of delays caused by other contractors, the evidence is not sufficient to establish the extent of such damage and to fix reasonable compensation, and plaintiff is accordingly not entitled to recover.

Same.—It is not necessary to prove damages with mathematical exactitude, but some proof is necessary to arrive at a reasonable compensation.

Same.—In the instant case the burden of proof was on the plaintiff, and this burden has not been sustained.

Same.—Where part, if not all, of the equipment used by the plaintiff on the contract with the defendant was also used interchangeably by plaintiff during the delay period on other contracts not with the defendant; it is *held* that it was necessary for plaintiff to prove what machinery was idle, when it was idle, and the rental value, and failing so to do, plaintiff is not entitled to recover.

Same.—In claiming compensation for overhead during the delay period, the evidence is insufficient to establish the proportion of overhead properly allocable to the contract in suit, and no recovery can be had for failure of proof. *Plumley* v. *United States*, 226 U. S. 515; *Gertner* v. *United States*, 76 C. Cls. 643, 660.

Same.—Where plaintiff found it cheaper to purchase material adjacent to or nearby rather than to haul material which had been furnished by the Government; and where, under the contract, plaintiff was not permitted to purchase any material without obtaining an order in writing from the contracting officer; and where no such order was obtained; it is *held* that with respect to this item of plaintiff's claim there has been an insufficient and improper method of proof of damages which would have been the difference between the contract price without the delays and the extra cost to which plaintiff would have been put due to double hauling and handling, and plaintiff is accordingly not entitled to recover.

The Reporter's statement of the case:

Mr. Harry Bergson for the plaintiff. *Messrs. Quincy I. Abrams* and *Philip Bergson* were on the briefs.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Joseph M. Friedman* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a Massachusetts corporation organized under the laws of that Commonwealth and has its principal place of business at Quincy, Massachusetts. It is engaged in the business of highway road construction and has been since 1931.

2. Plaintiff in April 1934 received from the United States War Department an invitation to bid on the construction of approaches to the Bourne Bridge which spanned the Cape Cod Canal in Massachusetts.

The invitation to bid comprised a specification of the contemplated work, four sheets of drawings and a set of plans, respectively, plaintiff's exhibits 1, 2, 3, and 4, which are made a part hereof by reference.

3. On June 8, 1934, a contract was entered into between the plaintiff and the United States to furnish all plant, labor, and material and perform all work required for the con-

struction of the highway approaches to the Highway bridge over the Cape Cod Canal at Bourne, and for the reconstruction of a section of state highway under the bridge on the north approaches to the Bourne Bridge. The contract, plaintiff's exhibit 7, is made a part of this finding by reference.

4. Notice to proceed with the work was received by the plaintiff on June 27, 1934, the contract to be completed 210 days thereafter, which made the date of completion January 23, 1935.

The contract was completed September 9, 1935, but by reason of circumstances hereinafter set forth, no liquidated damages were assessed by the United States.

5. Plaintiff's principal work under the contract was a "cut and fill" job, that is to say, excavation from the south side of the Cape Cod Canal necessary in preparing those approaches to be hauled across the Canal and utilized as earth fill for the approach to the north end of the new bridge. On the north approach to the bridge an underpass for the state road was located. The construction of the underpass was the subject of a separate contract with Frank T. Westcott.

6. With its bid plaintiff submitted a list of equipment which it proposed to use on the contract, which was satisfactory to the United States.

7. In the specifications, section 3, it was provided:

> It is required in other contracts that the abutments of the bridge shall be completed on or before August 8, 1934, and before that date the contractor for the construction of the highway approaches to the Bourne Bridge shall under his contract place embankments at the abutments. Filling material shall not be deposited within nor adjacent to the abutments until the masonry is sufficiently completed and/or as the contracting officer directs.
>
> The above date of August 8, 1934, has been extended by 25 working days, and the contractor for the bridge substructures may or may not take advantage of this extension of time.
>
> If, in the opinion of the contracting officer, the work under this contract be delayed owing to failure of others to complete the abutments of the bridge on or before the dates stated in this paragraph, additional time will be allowed for the completion of the work under this

contract, to such an extent as will, in the opinion of the contracting officer, compensate sufficiently for such delay.

The contractor shall have no claim for or on account of any damage or delay due to the operations of other contractors or their movements over his section of the work.

8. The specifications also provided, page 8, section 16, 2d paragraph, that:

> While work under this contract is in progress the construction of the bridge over the canal and the bridge over the State highway will be carried on under other contracts. The contractor under this contract shall not interfere with material, appliances or workmen of any other contractor or workmen of the United States who may have work at these sites. As far as practicable all contractors shall have equal rights to the use of all roads, grounds and adjacent canal. In case of disagreement regarding such use the decision of the contracting officer shall govern.
>
> The contractor under this contract shall perform the various operations of his work in such order, at such times, and in such manner as the contracting officer may direct so as not to interfere with the operations of other contractors. He shall allow other contractors access to an unobstructed passage over the work as may be necessary in the opinion of the contracting officer.

In section 23 of the specifications, page 10, it is provided:

> 23. *Claims and protests*.—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the engineer or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within ten (10) days thereafter, or be considered as having accepted the record or ruling (see Arts. 3 and 15 of the contract).

9. The situation regarding the job from the plaintiff's position was that on the date of the notice to proceed, to-wit, June 27, 1934, the major part of the work consisted in excavation from the south side of the canal, dumping and placing the fill on the north side of the bridge approaches at stations 93+69 .90, 95+62 .60 and 97+75. See plaintiff's exhibit 4, sheet 8 made a part hereof by reference. Incidental to this was the grading and preparation of a traffic circle on

the north and south approaches to the underpass and reconstruction of a section of State Highway.

10. The date of January 23, 1935, fixed by the contract for the date of completion, afforded ample time to complete plaintiff's work, was a reasonable estimate for performance, and plaintiff, except for the circumstances thereinafter recited, could have completed the work within that time, notwithstanding the extension of 25 working days for completion of the abutments by other contractors.

11. The contract referred to in Finding 5 with Frank T. Westcott was entered into July 27, 1934, notice to proceed was received by Westcott August 17, 1934, and the date for completion was January 24, 1935. The Westcott contract called for "constructing bridge at the State Highway under northerly approach to the highway bridge over the Cape Cod Canal at Bourne, Massachusetts," is filed in evidence and is made part hereof by reference.

12. Plaintiff's original plan for making the fill was to excavate, load trucks, and drive the trucks on the overpass constructed by Westcott and dump the earth to the bottom of the area to be filled. When plaintiff started the fill operation, the Westcott construction on the abutment piers was not completed. It was impossible for plaintiff to carry out the work as planned owing to this condition, because the dumping and filling necessarily could not go to higher levels than the concrete work of Westcott had reached. Plaintiff's equipment, engaged in excavation, fill, and trucking, could work only part time and not to capacity. Only 200 or 300 cubic yards of earth per day could be utilized at the work site. Because the work on the Westcott contract had not gone forward sufficiently the earth was not dumped from a higher level and then spread and compacted. The alternate procedure required plaintiff to build up the fill from the bottom level of the roadway in successive layers until it reached the requisite height.

13. The delay to plaintiff was occasioned for the most part by failure of the United States to let the contract of Westcott earlier and so provide available working conditions for continuously making the fill as planned. Contributing to this slow down and delay was the fact that Westcott, because of

the heavy Labor Day traffic, was required to keep open the State Highway until after September 3, 1934.

This highway was spanned by the overpass and the construction of its piers would have obstructed and prevented traffic.

14. Mr. Hosbach, the resident engineer officer of the project for the Government, prepared a progress sheet at the time plaintiff's contract was let, which contemplated completion of the job in 210 working days. This progress schedule was changed when it became apparent that the Westcott concrete work was preventing plaintiff from going ahead as planned and bears the notation "Completion date of highway, eng. 262, postponed to July 1, 1935; due to late letting of bridge contract W. 175 eng. 266".

15. The work done by plaintiff on the fill was controlled almost entirely by the progress of Westcott in erecting the overpass. The first operation by Westcott was clearing the ground at the overpass site and then to excavate for his footings. Thereafter footings were poured; but the pouring did not take place at one time but progressively. After a footing was completed the first lifts of the columns, about 18 ft. high, were erected.

This required wooden forms to be set up for the concrete. In the construction of footings and after pouring, a period for curing and hardening of the concrete was allowed, generally 4 or 5 days.

16. Plaintiff alleges that the underpass construction, to-wit, the piers and columns erected by Westcott differed in form and design, from the showing of the drawings and in the specification upon which its bid was prepared, and that the use of the word "abutment" as descriptive of the actual structure was misleading.

17. The drawings upon which plaintiff bid did not show the exact detail of the underpass construction that was contemplated in the contract awarded to Westcott. The drawing, plaintiff's exhibit 4, sheet 8, shows only a profile of the abutment support for the overpass taken along the center line of the proposed new road.

The portion of the drawing relating to the overpass is what is known as a phantom drawing, that is, it is shown in light

lines and in no detail. It illustrates between stations 94 plus 49 and 97 plus 75, several vertical piers or bents which support the overpass and these piers pierce a fill having a 2 to 1 slope. From this drawing no exact definition of the piers or abutments is possible. In the specification it is stated that:

> It is required in other contracts that the *abutments* of the bridge shall be completed on or before August 8, 1934, and before that date the contractor for the construction of the highway approaches to the Bourne Bridge shall under his contract place embankments at the *abutments*. Plaintiff's exhibit 3, par. 3. [Italics supplied.]

The "abutments" referred to in the drawings and specifications of plaintiff's contract sufficiently identified the dimensions of the work and the volume of earth fill required.

18. Plaintiff protested in writing to the contracting officer concerning the delays occasioned by other contractors in letters addressed to Col. John J. Kingman and asked for extensions of time to complete the contract:

AUGUST 8, 1934.

Re: Approaches to Bourne Highway Bridge.

> DEAR COLONEL KINGMAN: This is to notify you that we have been and are now being delayed on the construction of the highway approaches to the Bourne Highway Bridge over the Cape Cod Canal. We have not moved all the equipment assigned for this construction as it is not possible for us to excavate for the fill due to the construction of the Bourne Highway Bridge over Route 6 by contractors other than ourselves. Therefore, in compliance with Article 9 of the contract dated June 8, 1934, governing the construction of said approaches it will be necessary for us to have an extension of time in order to complete our work. Will you please see that this extension is granted and so notify us.

Article 9 of the contract appropriate to this reference reads as follows:

> Art. 9. *Delays-Damages*—* * * Provided that the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without

> the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties thereto, subject only to appeal, within 30 days by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Again on October 25, 1934, plaintiff wrote Col. Kingman complaining of Westcott's delay and requesting a further extension of time, and further, another request for extension of time was made April 29, 1935.

19. In response to these requests for extension of time change orders 2 and 3 were granted comprising 189 calendar days.

Later, on August 28, 1935, change order No. 4 was made for 40 calendar days. This change order resulted from direction by the Government to suspend seeding of the fills and approaches owing to the undesirability of so doing in the heat of summer, i. e., July 19, 1935.

20. The total number of calendar days covered by change orders 2, 3, and 4 was 229. Of this total 189 were requested by plaintiff and 40 were allowed because of the order to suspend seeding.

21. Included in each change order prepared by the United States Engineer's Office, there were set out the following conditions:

> It is understood and agreed that all other terms and conditions of said contract as modified by change order No. —— shall be and remain the same.
>
> Therefore, if the foregoing modification of said contract is satisfactory, please note your acceptance thereof in the space provided below.

Upon receipt of the change orders plaintiff signed this endorsement:

> The foregoing modification of said contract is hereby accepted.

22. In none of the applications for extension resulting in the change orders accepted by the plaintiff was there a request for extra compensation, due to work outside the contract requirements.

23. On or about March 21, 1936, the plaintiff executed under its corporate seal and delivered to the defendant an instrument in writing as follows:

> In accordance with the provisions of paragraph (d) of Article 16 of the United States Government form of Contract No. PWA 51, being further described as Contract No. W175 Eng. 262 dated June 8, 1934, and executed between the War Department, United States Engineer Office, Boston, Massachusetts, and Eastern Contracting Company, Quincy, Massachusetts, for the construction of approaches to Bourne Highway Bridge, Cape Cod Canal, Massachusetts, together with all change orders pertaining thereto, said Eastern Contracting Company hereby releases the United States Government of all claims against the Government arising under and by virtue of this Contract other than and with the exception of the following claims, to wit:
>
> Due to subsequent contracts made by the Government with other contractors over which said Eastern Contracting Company had no control the said Eastern Contracting Company was delayed seven months in the completion of the work called for under the terms of its contract with said Government and by reason of said delay suffered considerable damage, and said Eastern Contracting Company specifically reserves the right to claim additional compensation in the sum of approximately $86,545.00 by reason of its claim for damages arising from the specific exceptions hereinbefore stated.
>
> IN WITNESS WHEREOF said Eastern Contracting Company has caused these presents to be signed and its corporate seal to be affixed by Alexander Pompeo its Treasurer thereunto duly authorized this 21st day of March 1936.
>
> EASTERN CONTRACTING COMPANY,
> By (Sgnd.) ALEXANDER POMPEO,
> *Treasurer.*

OTHER CONTRACT ACTIVITIES DURING THE PERIOD COVEPED BY THIS SUIT

24. During the period covered by the contract here considered and the extensions of time granted by the change orders, plaintiff entered into a contract for the reconstruction of a section of state highway in the towns of Bourne and Wareham amounting to $67,999.70. This contract was executed the 27th day of November 1934. Work was started on this project about December 1, 1934, and was completed about January 27, 1936.

On November 27, 1934, plaintiff entered into a second contract with the Commonwealth of Massachusetts for the construction of a section of state highway located near the town of Bourne, Massachusetts, and known as the Bourne-Plymouth contract, for $77,647.70. This contract work was started about December 13, 1934, and was completed about November 15, 1935.

25. The equipment used by plaintiff on the Bourne-Wareham job, the Bourne-Plymonth job, and the job in suit, was more or less interchanged from one job to another; dependent upon practical considerations.

26. The site of the Bourne-Wareham job abutted the site of the contract here in suit, while the Bourne-Plymouth job was between 4 and 5 miles distant connected by a hard-surfaced road. At the time plaintiff started operations on the Bourne overpass construction all of its equipment with few exceptions was located in a yard at Bourne, upon Government property.

When the progress on the Bourne approach job allowed, equipment was transferred therefrom to the Bourne-Wareham construction and there put into operation.

The same plan of operation was adopted with respect to the Bourne-Plymouth contract. Equipment was put to use on all three jobs by staggering the operation as was expedient to the contractor. Plaintiff's equipment was not completely idle during the 229 days of delay on the Bourne approach job, but was utilized in the construction work of the other two contracts.

27. In progress charts made up by the resident engineers on the Bourne-Wareham and Bourne-Plymouth jobs as part of their official duty, the presence of all shovels, bulldozers, trucks, etc., was recorded. The charts show the date the equipment was on the job site and for what periods.

Plaintiff operated on the Bourne-Wareham construction 2 shovels the first week in December 1934, 1 the second week, 2 the third week, 1 the fourth week, and in the first three weeks of January 1935, 1 shovel. A bulldozer was present on this job for the period set out.

Beginning again in March 1935 to the end of May 1935, 1 to 2 shovels were again shown as operating on that job.

28. On the Bourne-Plymouth construction from December 18, 1934, down to and including May 1935, from 1 to 4 shovels were in operation intermittently, as well as other road working tools.

29. During the period that plaintiff was engaged in construction on the Bourne overpass, the Bourne-Wareham and the Bourne-Plymouth jobs, no additional equipment was purchased, except as related in Finding No. 31.

PLAINTIFF'S CLAIM OF DAMAGE

30. On March 21, 1936, plaintiff executed a general release to the United States excepting $86,545.00 claimed as damage suffered for seven months' delay in the performance of its contract. In its petition filed November 7, 1938, damages were alleged to be $170,097.82.

Included in plaintiff's claim for damages is an item of $22,500.00 for 45,000 cubic yards of borrow material, the balance for maintenance of equipment held on the job and overhead cost attributable to delay.

Plaintiff submitted in evidence an itemized list of damage based upon a delay of 229 calendar days which resulted in a loss to plaintiff of 192 working days.

Included in this claim was the rental value of the equipment corresponding to the list filed upon the undertaking of the Bourne overpass construction. Also an item of the cost of rehandling 45,000 cubic yards of fill on the overpass,

together with overhead expenses of various executives and employees for the period of 229 days.

Item 1. Equipment rental for 192 working days	$234,240.00
Item 2. 45,000 cubic yards of fill	22,500.00
Item 3. Overhead expenses for 229 days	12,791.00
Total	269,531.00

31. The evidence is not sufficiently clear to support a finding of actual damage for idle equipment, Item 1. There is no separation or apportionment of the days that the equipment was engaged in work on the three different contracts. The basis of the claim is that equipment on this contract was by delay prevented from removal and use beneficial to plaintiff. The evidence definitely establishes use on two other contracts of considerable size, but does not segregate or set out the extent or value of this other work. No other equipment was purchased, save one piece of apparatus, by plaintiff in the construction of the Bourne-Wareham or Bourne-Plymouth jobs, which were constructed during the period of this contract.

32. As to Item No. 2 for earth fill, the proof is clear that plaintiff has not been paid for 43,869 cubic yards of borrow placed at the overpass. The plans and specifications indicated that there would be 13,000 cubic yards more or less of fill on the north side in excess of excavation on the south side, putting the contractor to the necessity of using 13,000 cubic yards, or a quantity around that amount, of material from a borrow pit on the north side to make up for the deficiency in haulage of excavated material from the south side, for which he would be specially paid. This presupposed hauling to the north side and there dumping the material as fast as it was excavated on the south side. As matters actually developed, due to delay in the Westcott operations, through no fault on plaintiff's part, if this plan had been adhered to excavation on the south side would have proceeded at an unduly slow rate, to accommodate the situation on the Westcott job, or the excavated material would have had to be stored in a stock pile on the south side and thereafter rehandled, loaded, and trucked to the north side. As an alternative, because it desired to keep operations going, and because it was more efficient and cheaper to do so, plaintiff

wasted the excavated material in a vacant lot on the south side, eliminated the haulage over the canal, and made the fill on the north side from a borrow pit there available.

The delay at the Westcott overpass did not allow a continuous or steady operation of trucks hauling the earth over to the point of fill from the south side, but only permitted hauling in intermittent and meagre amounts. A charge of 50 cents per cubic yard of the borrow is a fair and reasonable price therefor. At 50 cents per cubic yard the charge for 43,869 cubic yards would be $21,934.50.

There is no evidence of the difference in what it would have cost plaintiff to excavate, haul, and fill as originally planned, had there been no delay, and what it actually cost plaintiff to excavate, waste, borrow, and fill under the change in the plan of operations, due to the delay.

33. Plaintiff charges the job at the overpass with the entire overhead of the operation of the Eastern Contracting Company during the 229 days of additional time required by that work. During a substantial part of this period there were engaged in the conduct and supervision of the Bourne-Wareham and Bourne-Plymouth jobs, the same general manager, superintendent, secretary, and office force. No allocation of overhead or apportionment of the expenses to each or either of the three operations is possible of determination from the proof.

34. An audit was made of plaintiff's books and records for the period covered by the three contracts. Under the plaintiff's system of accounting which was adequate for the purposes of showing total work done and money received for such work, there was available no book record as to individual job costs with respect to overhead or the disposition of apparatus over the number of jobs in hand or details of pay rolls sufficient to charge any one operation with a proportionate amount of the general expense.

The court decided that the plaintiff was not entitled to recover.

Whaley, *Chief Justice*, delivered the opinion of the court:

Plaintiff brings this suit for damages for delays caused by the defendant in the performance of its contract with the Government.

The facts show that on June 8, 1934, plaintiff entered into a contract with the defendant, through the War Department whereby, in consideration of the sum of $186,022.66, plaintiff agreed to furnish all plant, labor, and material, and to perform all work required for the construction of the highway approaches to the highway bridge over the Cape Cod Canal at Bourne, Massachusetts, and for the reconstruction of a section of the highway passing under the overpass on the north approaches to the Bourne Bridge, in strict accordance with the terms of the contract and specifications. The work was to be completed within 210 days after notice to proceed.

Notice to proceed was given to plaintiff on June 27, 1934 which fixed the completion date as January 23, 1935. At the time plaintiff received notice to proceed and also at the time plaintiff's contract was executed, the Bourne bridge was in the early stages of construction. The contract for the construction of the Bourne Bridge had been let to the P. J. Carlin Company. The contract for the construction of the overpass on the north approaches was not let to Frank T. Westcott until July 27, 1934. Notice to proceed was given to Westcott on August 17, 1934 which made the completion date of his contract January 24, 1935.

The principal work required under plaintiff's contract was what is known as "cut and fill" work, that is, material, which plaintiff would remove from the south side of the canal in making the south approaches to the bridge, would be hauled across the canal and used as "fill" in making the north approaches to the bridge. The material belonged to the defendant.

Plaintiff was put on notice, under paragraph 16 of the specifications attached to the contract, that all three phases of construction, the construction of the Bourne Bridge over the canal, the bridge over the State Highway (the overpass), and the reconstruction of the section of the State Highway were to proceed concurrently under separate contracts.

Plaintiff was delayed in the performance of its work by the operations of the other contractors. Upon notice of these delays to the contracting officer, extensions of time were granted by change orders. In all, the contracting officer

found that plaintiff had been delayed 229 days and issued change orders extending plaintiff's contract for that period of time.

Plaintiff's contract was completed on September 9, 1935. No liquidated damages were assessed and the full contract price was paid including an allowance for about 13,000 cubic yards of extra material used to complete the work on the north side. Upon accepting payment on March 16, 1936, plaintiff executed a release to the defendant of all claims except the sum of $86,545.00 which plaintiff alleged represented the amount of damages on account of delay caused by other contractors. Recovery cannot exceed the amount named in the release and is confined also to the items reserved. The only items reserved by plaintiff were for damages due to delays caused by the defendant entering into contracts with other contractors after date of plaintiff's contract.

The Bourne Bridge contract was entered into previous to plaintiff's contract and the only contract entered into subsequently was that with Westcott. Although plaintiff has attempted to prove a larger amount than that reserved, no greater amount can be recovered than that stated in the release. *P. J. Carlin Construction Co.* 92 C. Cls. 280, 305.

Plaintiff is seeking recovery on three items; (1) equipment rental for 192 working days; (2) 45,000 cubic yards of borrow material; (3) overhead expenses for 229 days.

The evidence clearly shows that the plaintiff has been damaged by reason of delays occasioned by the other contractors and especially contractor Westcott. However, the burden of proof of the actual damages suffered must be borne by plaintiff and must be established by the greater weight of the evidence.

The evidence produced by plaintiff for equipment rental falls far short of the rule in such cases. Plaintiff owned all the equipment used to perform the work required by the contract. In attempting to prove damages plaintiff listed each piece of equipment, estimating the fair rental value of each piece for one day, assuming that each piece of equipment was in use each of the 192 working days, and multiplied the rental value by the number of working days.

At the time these delays occurred plaintiff had two con-

tracts with the Commonwealth of Massachusetts known as the Bourne-Plymouth and the Bourne-Wareham contracts. The site of these additional jobs was in the same vicinity as that of the equipment which was used in the performance of plaintiff's contract with the defendant. The same equipment was used on all three jobs by staggering the operations.

There has been a total failure on the part of the plaintiff to furnish sufficient evidence to show when each piece of its equipment was idle or the distribution of its equipment over the three jobs. The evidence discloses that part, if not all, of the equipment was used on the other contracts during the delay period and also that it was used on a construction job which plaintiff was finishing during the first two months of the contract.

It is necessary for plaintiff to prove what machinery was idle, when it was idle, and the rental value. This the plaintiff has failed to do. The evidence is not sufficient to allow recovery for any amount. Recovery must be denied on this item for failure of sufficient proof.

The item for overhead fails for lack of proof in a proper manner. Plaintiff listed certain of its employees who worked on the contract, fixed a weekly wage for each, and, assuming that they worked the entire delay period, multiplied the amounts by the number of weeks of the delay and the resultant amount was the overhead charge.

As shown above, plaintiff had three contracts going on at the same time and a fourth contract part of the time. There is no attempt to show the allotment as to what portion of time each employee spent on plaintiff's contract with the Government and what portion was spent on other contracts. It is simply a blank assumption that the time of the employees was taken up entirely with this one contract to the exclusion of the others. It was encumbent upon the plaintiff to state what portion of the overhead was a fair and reasonable charge for this contract and what proportions the other contracts have. The evidence is insufficient to establish the amount of overhead which is recoverable. No recovery can be had on this item for failure of proof. *Plumley* v. *United States*, 226 U. S. 545; *Gertner* v. *United States*, 76 C. Cls. 643, 660.

The third and last item is for the furnishing of approximately 45,000 cubic yards of borrow material in making the north fill. This is a claim for extra material furnished and not damages occasioned by the delays. The facts show that plaintiff was to haul from the south side of the bridge to the north side the material furnished by the defendant. It was unable to make continuous hauls of the material due to the delays occasioned by the Westcott contract. The plaintiff placed this material on a vacant lot. When the time arrived when the work could be completed on the north side, plaintiff found it cheaper to purchase material adjacent to or near the north side than to haul material which had been furnished by the Government and was piled on the vacant lot on the south side.

Under article 5 of the contract plaintiff was not permitted to purchase any extra material without obtaining an order in writing from the contracting officer and the price for the material stated in the order. No order was given by the contracting officer. The method used by plaintiff was resorted to purely for the purpose of economy and hastening the work. Doubtless plaintiff used this method to mitigate damage. Nevertheless, it was against the contract to do so.

There has been no attempt on the part of the plaintiff to show what the extra cost would have been to have taken the material on the lot and hauled it to the place where the work was being performed. The actual damage to plaintiff would have been the difference between the contract price without the delays and the extra cost to which plaintiff would have been put due to double hauling and handling. In this item, as in the other two, there has been an insufficient and improper method of proof of damages occasioned by the delays, and therefore there can be no recovery.

It is not necessary to prove damages with mathematical exactitude but some proof is necessary to arrive at a reasonable compensation. The plaintiff was damaged by the delays but the evidence does not even furnish a reasonable basis on which a fair-minded person can arrive at a reasonable and fair amount of compensation. It is unnecessary to discuss the length of the delays for which the defendant is responsible. It is impossible to pick out the machinery which was idle and

the length of time it was idle. It is impossible to ascertain the number of employees, the length of time employed, proportion of salaries which should be allocated to this contract, and the proportion of the cost of their employment which should be allocated to the other contracts. Some of the employees for whose services compensation is claimed in the overhead charges do not appear on the pay roll and the salaries charged for others are grossly exaggerated. The burden of proving damages was on the plaintiff and this burden has not been sustained.

Recovery is denied. The petition is dismissed.

It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

CONSOLIDATED ENGINEERING CO. v. THE UNITED STATES

[No. 43290. Decided November 2, 1942]

On the Proofs

Government contract; meaning of "accessible" as used in plumbing specifications.—Where plaintiff, a Delaware corporation, entered into a contract with the Government to furnish all labor and materials, and to perform all work required for the construction of an office building for the House of Representatives, and where the specifications provided, with reference to the plumbing, that soil, vent, and waste pipes in all inaccessible places should be of brass, and that wrought-iron pipe might be used in places which were "accessible"; it is *held* that within the meaning of the specifications an "accessible" space is one from which piping could be removed and replaced without damage to the surrounding walls or partitions; and that the pipes installed within shafts or other enclosures to which access could be had through panels or similar openings were not "accessible" within the meaning of the specifications, and plaintiff is accordingly not entitled to recover.

Same; decision of contracting officer.—Where under the terms of the contract and specifications the question of whether the pipes were in fact accessible was to be determined by the contracting officer, or his duly authorized representative, subject to appeal to the head of the department; the contracting officer's ruling, not altered on appeal, was not arbitrary nor capricious.

The Reporter's statement of the case:

Mr. Dean Hill Stanley for the plaintiff. *Mr. Joseph R. McCuen* was on the briefs.

Mr. Elihu Schott, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Carl Eardley* was on the brief.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Baltimore, Maryland.

2. On December 8, 1930, plaintiff and defendant entered into a contract in writing whereby, for the sum of $5,270,000, the plaintiff agreed to furnish all labor and materials, and perform all work required for the construction of a new office building for the House of Representatives. Certain drawings and specifications were designated as a part of the contract.

The building was constructed by the plaintiff and accepted by the defendant, and the price named in the contract, with additions or deductions, as the case may be, made in writing, has been paid.

The Architect of the Capitol, hereinafter referred to as the Architect, was the contracting officer. The department concerned in the construction of the building and having charge thereof was the House Office Building Commission.

3. Article No. 5 of Section XXVIII of the specifications pertaining to plumbing provided that except as noted in article No. 6 "all soil, waste and vent pipes and all interior downspouts and roof drainage piping above the ground shall be full weight genuine galvanized wrought iron."

Article No. 6, so referred to, provided:

> All cold or hot-water, hot-water circulating and drinking water supply pipes, fire lines; and such roof drainage, and soil, waste and vent piping in the building as is concealed in chases, furred spaces, partitions or other inaccessible spaces, shall be full weight, seamless, grade "A" iron pipe size, red brass pipe with the exception of sizes 1½ in. or smaller, which shall be copper tubing as hereinafter specified.

* * * * *

All nipples used in this contract shall be of the same material and composition as the pipe specified hereinbefore.

* * * * *

All fittings on brass pipe lines that are used for waste, vent or drain lines shall be plain cast iron flat banded, recessed fittings same as specified for wrought iron.

* * * * *

4. In the course of the work, a controversy arose between the parties over the application of articles Nos. 5 and 6 of Section XXVIII of the specifications, plaintiff contending that these articles required soil, waste and vent pipes in pipe spaces provided with "access panels" 18½ by 24½ inches, or opening 14½ by 20½ inches for removable medicine cabinets, to be of wrought iron. The pipe spaces extended from floor to floor, with a depth in most cases back from the panel or cabinet of 10 inches and with a width of 4 feet 3 inches.

Defendant's officers contended that the specifications referred to required soil, waste and vent pipes in such spaces to be of red brass.

In the pipe spaces were also water pipes of smaller diameter. The pipes were first installed, and after installation enclosed by partitions of tile plastered and finished in the usual style. The enclosure thus made was for the purpose of concealing the pipes, which if exposed would be unsightly. Accessible through panel or cabinet opening were valves in certain of the pipes, whereby the supply of water could be cut off from any one toilet or washroom and such unit isolated for purposes of repair or replacement in toilet or washroom.

Panels and cabinets were of standard size and stock, and the openings in which they fitted were about five feet above floor level.

5. The Architect, in response to a request from the plaintiff for a decision on the subject, ruled on March 30, 1931, that red brass pipe should be installed. The plaintiff was not satisfied with the decision and requested a conference, which was held. May 8, 1931, the Architect adhered to his decision, advising the plaintiff as follows:

With reference to conference held in this office at which was discussed the interpretation of the specifications governing the scope of brass pipe to be used in the new House Office Building, you are advised that since that conference this office and our consulting architects and engineers have given the matter considerable thought and have come to the conclusion that this office would not be justified in deviating from its original decision.

It is considered that the wording of the specification is in no sense vague. The fact that an exception is noted in the paragraph preceding the principal requirement is not at all unusual and does not invalidate the requirements in any manner. It is clearly required that, where certain pipework is inaccessible, it shall be of brass. As this office understands the situation, it is the contention of the subcontractor that the pipe spaces in the rear of typical toilet rooms occurring in Members' suites are not inaccessible, since removable panels opening into these spaces have been provided. It is believed, however, that the provision for these panels does not affect the situation to any extent. The question is solely whether these spaces are in fact accessible.

It is believed that the interpretation to be applied in such a case is as follows: Pipework which is accessible is so placed that it can readily be removed without disturbing the structure or finish of any part of the building. If, as claimed by this subcontractor, these spaces are accessible, he would be able to install the work after the spaces had been constructed and finished. It is understood, on his own admission, this is impossible.

This office, therefore, considers its interpretation as indicated should be sustained and that the test as to accessibility be determined as outlined in the preceding paragraph. In any case, where the work is so accessible that replacement can be made without disturbing any part of the structure, wrought iron pipe may be used, but in all other cases, brass pipe, as specified, will be required.

Specifically, the spaces wherein wrought iron pipe may be used are as follows: [Here follows an enumeration of the spaces in which wrought iron might be used.]

6. According to the general understanding of the construction industry and of the engineering and architectural professions, an accessible space in a building where plumbing equipment is required to be placed is a space sufficiently large to permit the pipes contained therein to be reached

for purposes of adjustment and repair and if need be for removal and replacement without the necessity of destroying any of the structural features or finish of the surrounding building.

As applied to the situation herein set forth the term "inaccessible" referred to pipes so located in pipe spaces as not to be removable and replaceable in a fairly ready and practicable manner. The pipes required by the Architect to be of red brass were furnished and installed by the plaintiff, and were so located as not to be removable or replaceable in a fairly ready and practicable manner. Their removal and replacement would in practice involve cutting into the partition which enclosed them, and they were inaccessible within the meaning of the specifications.

7. The cost of furnishing the brass pipe over the cost of furnishing wrought iron pipe, with proper allowances for overhead and profit, is $10,854.41. This difference is exclusive of any difference in costs of labor, which are not satisfactorily proved.

8. There is no satisfactory proof that the decision of the contracting officer as to the requirement of brass pipes was erroneous.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

On December 8, 1930, plaintiff entered into a contract with the defendant to furnish all labor and materials, and to perform all work required for the construction of the New House Office Building in Washington, D. C. The contract price was $5,270,000. Plaintiff let the contract for the plumbing to a subcontractor in whose behalf this suit is brought.

The plaintiff contends that the contracting officer required the use of more brass pipes than the contract called for, that brass piping is more expensive than wrought iron otherwise permitted, and that it is entitled to recover the difference in material and labor costs made necessary by the extra brass equipment. Defendant contends that it required

only the amount of brass which was stipulated in the contract. It is conceded that brass is more expensive than wrought iron.

Article 5 of Section XXVIII of the specifications applicable to plumbing provided that except as noted in article 6,

> * * * all soil, waste and vent pipes and all interior downspouts and roof drainage piping above the ground shall be full weight genuine galvanized wrought iron.

The exception provided for in article 6 is as follows:

> All cold or hot-water, hot-water circulating and drinking water supply pipes, fire lines; and such roof drainage, and soil, waste and vent piping in the building as is concealed in chases, furred spaces, partitions or other inaccessible spaces, shall be full weight, seamless, grade "A" iron pipe size, red brass pipe with the exception of sizes 1½ in. or smaller, which shall be copper tubing as hereinafter specified.
>
> * * * * *
>
> All nipples used in this contract shall be of the same material and composition as the pipe specified hereinbefore.
>
> * * * * *
>
> All fittings on brass pipe lines that are used for waste, vent or drain lines shall be plain cast iron flat banded, recessed fittings same as specified for wrought iron.

Stating the issue simply, the contract provided that plaintiff should use brass soil, vent and waste pipes in all inaccessible places and that wrought iron might be used in places which were accessible. The reason for this distinction is that brass is practically everlasting, while wrought iron will rust out in the course of time. It was evidently intended that in positions where a part of the building or walls must be torn down in order to make replacements brass pipes should be installed. In other places, where changes could be made without injury to the walls or other parts of the building, the less durable wrought iron might be used. Brass was specified for hot and cold water pipes.

There were many pipes in the building, including roof drainage, soil, waste, vent, and other piping usually necessary in the construction of this type of building. Some of

the pipes were completely concealed within the partitions. Others were installed in chases and furred spaces. Except as noted below, there is no dispute as to these, as brass was specified.

The issue arises out of the soil, vent and waste pipes that were installed within shafts or other inclosures. In the various suites on each floor these shafts had access panels. In some of the suites these panels were 18½ by 24½ inches. In others the opening was placed behind the medicine cabinets. In the latter cases the opening was 14½ by 20½ inches.

The plaintiff contends that these panels made the pipes in all these shafts accessible and that it therefore should have been permitted to install wrought iron instead of brass pipes. The defendant contends that these panels did not make the pipes accessible within the meaning of the contract and the specifications.

In several other parts of the building there were doors of more or less normal size which opened into moderate sized compartments that contained many pipes. These were clearly accessible and plaintiff was permitted to use wrought iron in connection with all such installations.

Plaintiff contends that, since the specifications provided in general terms for wrought iron pipes and that brass was provided for in the exception, the evident intention was that more wrought iron than brass was to be used; but that the requirements of the contracting officer were such that the major portion of the piping fell within the exception rather than within the rule that had been provided. There is some degree of plausibility to this contention.

However, it seems to us that the proper construction is that two classifications were provided for and that the matter should be determined not upon the amount but upon the classification within which the particular work fell. The specifications do not show how much of either type of piping was to be furnished. In certain circumstances wrought iron was to be used and under other conditions brass was to be used.

The whole question turns on whether or not the otherwise incased and concealed pipes were made accessible by the panels.

The pipe spaces or shafts extended from floor to floor with a depth in most cases of from 10 to 12 inches, although some of them ranged to a depth of 3 feet with a width in most instances of 3 to 4 feet.

The convincing testimony in the case is to the effect that these pipes, in the sense that the term is used in the contract and the specifications, were not made accessible by the access panels. There were several pipes of different kinds in most of the shafts. One of the primary purposes of the panels was to afford access to the valves by means of which the supply to any room might be cut off without interfering with the supply to other parts of the building.

It would be difficult, expensive, and impracticable to disjoint, remove, and replace the pipes through these panels without tearing out the wall. In many instances it would be impossible to disjoint the pipes, much less remove a section of a pipe without removing a portion of the wall. The joints, Y's, elbows, and low ceilings make this more difficult. The pipes were numerous, many of the shafts were small, and for these reasons the pipes in some instances were imbedded in the shaft walls. To construe these small panels as making practically the entire piping system accessible would run contrary to the whole purpose of requiring brass pipes.

As the contracting officer has construed the specifications, practically all the wrought iron piping that he permitted to be installed can be removed and replaced when it deteriorates without injury or damage to the building and all pipes that cannot be so removed are of brass. This, we believe, is in accordance with a reasonable construction of the contract.

Under the terms of the contract and specifications the question of whether the pipes were in fact accessible was to be determined by the contracting officer, or his duly authorized representative, subject to appeal by the contractor to the head of the department which, in this instance, was the House Office Building Commission. In this case the contracting officer ruled that the panels did not make the pipes accessible. The Building Commission did not alter his ruling, and we do not think the ruling is either arbitrary or capricious.

The contract required plaintiff to install wrought iron pipes in accessible spaces and brass pipes in inaccessible spaces. The parties are in agreement that an accessible space is one from which piping could be removed and replaced without damage to the surrounding walls or partitions. No other reasonable construction can be made. A portion of the hearings in this case was held in the House Office Building where the conditions could be viewed first-hand. The physical facts as disclosed by the record justify the conclusion that the pipes involved in the controversy were inaccessible within any reasonable interpretation.

It follows that the petition should be dismissed. It is so ordered.

Madden, *Judge;* Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

HOWARD A. VAN AUKEN v. THE UNITED STATES

[No. 44646. Decided November 2, 1942]

On the Proofs

Pay and allowances; officer in United States Army with dependent mother.—*Held* that upon the undisputed facts plaintiff is entitled to recover.

The Reporter's statement of the case:

Messrs. King & King for the plaintiff. *Mr. Fred W. Shields* was on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Miss Stella Aiken* was on the brief.

The court made special findings of fact as follows:

1. The plaintiff, Howard A. Van Auken, is a Captain, Medical Corps of the United States Army, and has served on active duty since May 5, 1936, when he first accepted a commission.

2. Plaintiff's father died in September 1934. During his lifetime he was employed as a Sales Manager for a wholesale butter house. His estate consisted of $10,000 in life insurance, all of which he left to his widow, Mrs. Mabel H. Van Auken, mother of the plaintiff herein.

3. Plaintiff's mother is 60 years of age. Her health is good but she possesses no training or experience which would enable her to hold gainful employment and she has not held any employment since May 1, 1936.

4. At the time of her husband's death she owned a house in Bergenfield, N. J., which she had purchased in 1927, for $9,250, giving a mortgage of $5,500 on the property. The mortgage was gradually reduced until June 1937, when it was $4,500, at which time she sold the house for $4,750. After payment of the mortgage and back interest she realized $170.00 from the sale of the house.

5. With the proceeds of her husband's life insurance plaintiff's mother purchased $1,000 worth of preferred stock of the American News Company, and certain oil royalties for which she paid between $6,000 and $7,000. She used the remaining portion of her husband's life insurance to pay his funeral expenses and certain outstanding debts amounting to about $1,000, to defray part of the school expenses of her youngest son, and to pay for some living expenses. She realizes an income of $10.00 a month on her American News Company stock. For a few months after the purchase of the oil royalties she realized an income from them of about $22.00 a month. The income therefrom has decreased, and during the period May 1, 1936, to June 1939, it has averaged not more than $15.00 a month. She has attempted to sell the oil royalties but without success.

6. From May 1, 1936, to June 1937, plaintiff's mother lived with her two unmarried daughters, Kathleen and Mary, in her home at Bergenfield, N. J. The daughter Kathleen was then employed, first at a salary of $15.00 a week, which was gradually increased until in June 1937 she was earning $25.00 a week. While living with her mother she paid $7.50 per week for her room and board, which was actually worth about $10.00 a week. Mary, the second daughter, was 15 years of age and attended school.

7. While living at Bergenfield, N. J., the mother's living expenses averaged between $130 and $135 a month, and consisted of the following items:

Taxes on house	$16.50
Interest on mortgage	23.00
Repairs and upkeep of house	15.00
Fire insurance and life insurance	15.00
Food	20.00
Heat	3.50
Gas and light	3.50
Water	1.00
Clothing	15.00
Laundry and cleaning	5.00
Telephone	4.00
Amusements	5.00
Incidentals	5.00 to 10.00

These items of living expenses represent the full amounts expended for taxes, repairs, insurance and interest on mortgage on the house, all of which were incurred by reason of her ownership of the house. The remaining items of expense consist of her pro-rata share of the living expenses incurred by the three members of the family living in the house.

8. During the period from May 1936 to June 1937, plaintiff gave his mother $300 in cash about the middle of May 1936, when he departed for duty at the Edgewood Arsenal, Edgewood, Maryland, and thereafter he sent her $100 a month as his contribution to her support, the contributions being made in most cases by check. Aside from plaintiff's contributions the mother's only other sources of income were the $7.50 a week paid by the daughter Kathleen, and an average of not exceeding $32.00 a month which she realized from her stock in the American News Company and her oil royalties.

9. On June 24, 1937, the mother and her daughter Mary moved from Bergenfield, N. J., to Fort Belvoir, Va., and since that date they have occupied the quarters assigned to the plaintiff at the fort. While living at Fort Belvoir, Va., the mother's living expenses have averaged $67 to $72 a month, and consist of the following items:

Food	$25.00
Clothing	20.00
Telephone	1.00
Life insurance	6.73
Amusement and recreation	5.00
Laundry and cleaning	5.00
Incidentals	5.00 to 10.00

All of these items consist of either the mother's pro-rata share of the household expenses or her own personal living expenses and are attributable to her alone. While living at Fort Belvoir, Va., she has realized an income of about $19.00 a month from her American News stock and her oil royalties. The plaintiff has defrayed all her living expenses over and above any amounts which she has received from her stocks and royalties.

10. Plaintiff's mother has four children besides the plaintiff. The eldest is her son Hanlon, who is 34 years of age, married and has two children. He is a First Lieutenant in the Air Corps, United States Army, and has served on active duty during the period covered by this claim. The daughter Kathleen is 32 years of age and was married in 1937, and is not now employed. The son Robert is 25 years of age. He is unmarried and during the period covered by this claim attended Guilford College, N. C., until about January 1936, when he commenced a course in the General Motors Institute of Technology, at Flint, Mich. In February 1939, he finished a flying school course and since that time has been serving on active duty as a Second Lieutenant, Air Corps, Reserve, U. S. Army. The daughter, Mary, is 17 years of age, and has attended school during the period covered by plaintiff's claim. None of these children has at any time contributed anything to the support of their mother. During the period of this claim, the mother of the plaintiff has, in fact, been dependent upon him for her chief support.

11. Plaintiff filed claim for increased rental and subsistence allowances on account of a dependent mother on two separate occasions and such claim was denied by the Comptroller General of the United States.

12. Plaintiff was married on June 3, 1939, on which date his claim terminates.

13. If entitled to increased rental and subsistence allowances on account of a dependent mother for the period May 5, 1936, to and including June 2, 1939, there is due the plaintiff the sum of $1,077.06, as computed by the General Accounting Office.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The facts in this case are not in dispute. The proof is, and the Court has made an ultimate finding, that during the period of plaintiff's claim his mother was in fact dependent upon him for her chief support. The increase in rental and subsistence allowances due plaintiff on account of this dependent condition is $1,077.06, and judgment in this amount will be rendered in favor of the plaintiff accordingly. No cases are cited in the briefs. In view of the many dependent mother cases heretofore decided it would seem unnecessary to recite or review them in this memorandum.

FORD MOTOR COMPANY (DELAWARE) AND AFFILIATED COMPANIES v. THE UNITED STATES

[Nos. 45091 and 45427. Decided November 2, 1942]

On the Proofs

Income tax; assets of wholly owned subsidiary acquired by parent corporation in liquidation; basis for depreciation deduction; fair market value.—Where, on May 1, 1920, plaintiff liquidated its wholly owned subsidiary by surrendering all of said subsidiary's capital stock (except 3 qualifying shares) in exchange for all of the assets of such subsidiary; and where in making consolidated tax returns for the years 1921 to 1926, inclusive, plaintiff computed its deductions for depreciation on account of the assets so acquired on the amount then determined by plaintiff as the actual fair market value of such depreciable assets on the date of acquisition, May 1, 1920; and where the Commissioner of Internal Revenue declined to approve this basis for depreciation purposes and instead computed and allowed the depreciation deductions on the basis of cost of such assets to the liquidated subsidiary corporation; it is *held* that plaintiff is entitled to recover.

Same; provisions of 1918 Revenue Act; property acquired treated as cash.—Under the provisions of section 202 of the Revenue Act of 1918, when property is exchanged for other property, the property so received shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value.

Same.—Where plaintiff liquidated a wholly owned subsidiary and acquired all the assets of such subsidiary in exchange for the surrender of all of the capital stock of such subsidiary, the transaction gave rise to a taxable profit or a deductible loss (*Burnet* v. *Aluminum Goods Company*, 287 U. S. 544), and plaintiff was entitled to use as the basis for its deductions for depreciation for the years involved the actual fair market value of the depreciable assets as of the date of acquisition. *Heiner* v. *Tindle*, 276 U. S. 582, and other cases cited.

Same; no ownership interest prior to acquisition of assets.—Prior to the date of acquisition of such depreciable assets, plaintiff had no ownership interest in the properties of its subsidiary (*Klein* v. *Board of Supervisors*, 282 U. S. 19, 24); on and after that date plaintiff owned outright said assets and then became entitled to depreciate them for tax purposes on the basis of their actual value as of the date of acquisition.

Same; parent and subsidiary separate taxpayers.—Although affiliated, plaintiff and its subsidiaries were at all times separate taxpayers. *Swift & Co.* v. *The United States*, 69 C. Cls. 171.

Same.—Under the consolidated returns provisions of the 1918 Revenue Act (Section 240) a parent corporation was given no ownership interest in the assets of a subsidiary.

Same; section 331 of 1918 Revenue Act.—Section 331 of the Revenue Act of 1918 related only to the determination of "invested capital" for the purpose of the excess profits tax credit against net income and had no effect upon the determination of net income; and said section ceased to have any effect when the excess profits tax was repealed by the Revenue Act of 1921; said section 331 had no application to the basis for deductions for depreciation. *Monarch Electric & Wire Co.* v. *Commissioner*, 12 B. T. A. 158; affirmed 38 Fed. (2d) 417; and other cases cited.

The Reporter's statement of the case:

Mr. J. Marvin Haynes and *Mr. Robert H. Montgomery* for plaintiff. *Messrs. James O. Wynn, C. J. McGuire* and *W. C. Magathan* were on the brief.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

In No. 45091 plaintiff sued to recover $526,534.63 with interest, alleged overpayment of additional income tax and interest collected for 1921, and in No. 45427 sued to recover $3,469,368.75 of additional income tax of $2,694,705.90 and interest of $774,662.85 assessed and collected for 1922 to 1926, inclusive.

Plaintiff acquired certain depreciable assets from a wholly owned subsidiary on May 1, 1920, in exchange for stock when the subsidiary corporation was liquidated. The defendant computed plaintiff's depreciation deductions for 1921 to 1926 inclusive on the basis of the cost of such assets to the liquidated corporation. The question presented is whether plaintiff is entitled to have its depreciation deductions computed on the basis of the fair market value that the depreciable assets so acquired had on May 1, 1920. On that date the depreciable assets had a fair market value of $40,387,694.43 in excess of cost thereof to the corporation from which they were acquired in liquidation.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, Ford Motor Company (Delaware), is a corporation organized July 9, 1919, under the name of Eastern Holding Company, with an authorized capital of $100,000. July 14, 1919, the name was changed to Ford Motor Company and the charter amended to authorize issuance of capital stock to the amount of $100,000,000. The stock was to be all common of a par value of $100 per share. The principal offices of plaintiff are at Dearborn, Michigan.

2. Ford Motor Company (Michigan) was organized under the laws of the State of Michigan, June 16, 1903, with an authorized capital of $150,000, which on November 9, 1908, was increased to $2,000,000. The authorized capital stock was all common stock of a par value of $100 per share. Its principal place of business was at Highland Park, Michigan. Prior to May 1, 1920, it engaged in the business of manufacturing Ford automobiles.

3. Prior to July 5, 1919, the capital stock of Ford Motor Company (Michigan) was owned by the following named persons:

Henry Ford	11,400	shares
Edsel Ford	300	"
James Couzens	2,180	"
Rosetta V. Hauss	20	"
H. E. Dodge	1,000	"
John F. Dodge	1,000	"
J. W. Anderson	325	"
Gustava D. Anderson	325	"
Illinois Trust Company	350	"
David Gray	525	"
Paul Gray	525	"
Philip Gray	525	"
H. H. Rackham	1,000	"
Mrs. A. E. Kales	525	"
Total outstanding	20,000	shares

4. Henry Ford & Son, Inc. (New York), is a New York corporation organized May 1, 1919, with an authorized capital of $650,000, which on July 5, 1919, was increased to $1,500,000, all common stock of a par value of $100 per share.

5. May 3, 1919, Henry Ford & Son, Inc. (New York), issued 2,050 shares of its capital stock to Henry Ford for property known as the Green Island Property, located at Green Island, New York. On the same day it issued 4,000 shares of its capital stock to Mr. Edsel Ford for 50 shares of the capital stock of the Ford Motor Company (Michigan). July 5, 1919, Mr. Edsel Ford agreed to take 50 shares of the New York capital stock in place of the 4,000 shares, and this agreement was accepted and so recorded on the books of the New York company.

6. July 5, 1919, Henry Ford & Son, Inc. (New York), issued 11,400 shares of its capital stock to Henry Ford in exchange for 11,400 shares of the capital stock of Ford Motor Company (Michigan). On the same day it issued 250 shares of its capital stock to Edsel Ford in exchange for 250 shares of the capital stock of Ford Motor Company (Michigan).

7. The 13,750 shares of capital stock of Henry Ford & Son, Inc. (New York) issued to Henry and Edsel Ford, constituted all the issued capital stock of Henry Ford & Son, Inc. (New York).

8. July 16, 1919, Ford Motor Company (Delaware) issued 13,450 shares of its capital stock to Henry Ford in exchange

for 13,450 shares of the capital stock of Henry Ford & Son, Inc. (New York). On the same day it issued 300 shares of its capital stock to Edsel Ford in exchange for 300 shares of the capital stock of Henry Ford & Son, Inc. (New York).

9. July 16, 1919, the Ford Motor Company (Delaware), with funds provided by the Ford Motor Company (Michigan), purchased 6,100 shares (30½%) of the capital stock of Ford Motor Company (Michigan) theretofore held by stockholders other than Henry and Edsel Ford, for cash and bonds in the amount of $77,508,328.83. September 2, 1919, the Ford Motor Company (Delaware) purchased 2,200 shares (11%) of the capital stock of the Ford Motor Company (Michigan) theretofore held by stockholders other than Henry and Edsel Ford, for $29,570,894.57 cash.

10. July 16, 1919, the Ford Motor Company (Delaware) issued a demand note, noninterest-bearing and in the principal sum of $1,170,000, to Henry Ford & Son, Inc. (New York) in exchange for 11,700 shares of the capital stock of Ford Motor Company (Michigan), then owned by the New York company. July 17, 1919, Ford Motor Company (Delaware) turned over to Henry Ford & Son, Inc. (New York) 11,700 shares of the capital stock of Henry Ford & Son, Inc. (New York) in exchange for the demand note amounting to the principal sum of $1,170,000 mentioned above. On the books of Henry Ford & Son, Inc. (New York) this 11,700 shares of its stock thus received from Ford Motor Company (Delaware) was treated as Treasury stock, and is so recorded today.

11. May 1, 1920, Ford Motor Company (Delaware), then being the owner of 100 percent of the capital stock of Ford Motor Company (Michigan), exchanged such capital stock (with the exception of three qualifying shares) for the assets then owned by Ford Motor Company (Michigan). The Michigan corporation was thereafter dormant though not formally dissolved. It carried on no business of any kind.

12. For 1921 plaintiff as parent duly filed a consolidated income and profits tax return for itself and 12 affiliated corporations showing a total tax of $36,817,779.96, which was paid.

13. For 1922 plaintiff as parent duly filed a consolidated income tax return for itself and 15 affiliated corporations showing a total tax of $17,975,949.28, which was paid.

14. For 1923 plaintiff as parent duly filed a like consolidated return which included 24 subsidiaries showing a total income tax of $15,147,877.61, which was paid.

15. For 1924 plaintiff as parent duly filed a like consolidated return which included 24 subsidiaries showing a total tax of $16,643,206.83, which was paid.

16. For 1925 plaintiff as parent filed a like consolidated return which included 25 subsidiaries showing a tax of $18,501,378.55, which was paid.

17. For 1926 plaintiff as parent filed a like consolidated return which included 25 subsidiaries showing a tax of $12,127,413.01, which was paid.

No portion of the original tax so paid in the total amount of $117,213,605.24 is here sought to be recovered.

18. Subsequent to the filing of the returns for 1921 to 1926 the Commissioner of Internal Revenue made a determination of the tax liability of the affiliated group for 1921 to 1926 and determined certain deficiencies against the members of the consolidated group. Such deficiencies in taxes, together with interest thereon, were thereafter assessed against the several members of the affiliated group, and payments were thereafter made by Ford Motor Company (Delaware) and/or its affiliated companies as follows:

	Date paid	Tax	Interest	Total
For 1921:				
Ford Motor Company (Delaware) and affiliated companies	July 13, 1926	$516,744.80	$9,789.83	$526,534.63
For 1922:				
Ford Motor Company (Delaware) and affiliated companies	Apr. 5, 1928	$640,385.03	$177,917.37	$818,302.40
Ford Motor Company (Delaware) and affiliated companies	Apr. 5, 1928	32.32	8.98	41.30
Ford Motor Company (Delaware) and affiliated companies	May 15, 1928	45,366.19	12,905.44	58,271.63
Ford Motor Company (Delaware) and affiliated companies	May 24, 1928	8.83	2.52	11.35
		$685,792.37	$190,834.31	$876,626.68
For 1923:				
Ford Motor Company (Delaware) and affiliated companies	Dec. 19, 1928	$698,204.57	$181,624.04	$879,828.61

	Date paid	Tax	Interest	Total
For 1924:				
Ford Motor Company (Delaware) and affiliated companies	July 9, 1931	$122,000.00	$43,225.60	$165,225.60
Ford Motor Company (Delaware) and affiliated companies	Dec. 29, 1931	59,632.35	18,984.38	78,616.73
		$181,632.35	$62,209.98	$243,842.33
For 1925:				
Ford Motor Company (Delaware) and affiliated companies	June 26, 1931	$462,000.00	$146,365.39	$608,365.39
Ford Motor Company (Delaware) and affiliated companies	Dec. 29, 1931	207,015.23	71,420.25	278,435.48
		$669,015.23	$217,785.64	$886,800.87
For 1926:				
Ford Motor Company (Delaware) and affiliated companies	July 9, 1931	$316,000.00	$81,151.39	$397,151.39
Ford Motor Company (Delaware) and affiliated companies	Dec. 29, 1931	144,061.38	41,057.49	185,118.87
		$460,061.38	$122,208.88	$582,270.26
Combined total		$3,211,450.70	$784,452.68	$3,995,903.38

19. In the determination of the deficiencies for 1921 to 1926, inclusive, the Commissioner computed depreciation, gains, and losses by using the cost of the assets to Ford Motor Company (Michigan). On May 1, 1920, the assets received by Ford Motor Company (Delaware) when Ford Motor Company (Michigan) was liquidated had a fair market value of $40,387,694.43 in excess of the cost of the Michigan corporation.

There are in evidence and made a part hereof schedules marked Exhibits 1 to 7, showing the distribution of such amount to the various classes of property, and the depreciation that would be allowable on such amount, if the Delaware corporation is entitled to depreciate on the basis of the fair market value that these assets had on May 1, 1920.

20. Ford Motor Company (Delaware) and affiliated companies filed claims for refund for 1921 to 1926. The claims were filed with the Collector of Internal Revenue on the dates and for the amounts indicated:

Year	Date claim was filed	Amount of claim
1921	July 11, 1930	$516,744.80
1922	July 11, 1930	685,792.37
1922	Mar. 29, 1932	52,939.67
1923	July 11, 1930	698,204.57
1924	July 18, 1933	181,632.35
1925	July 18, 1933	669,015.23
1926	July 18, 1933	460,061.38

These refund claims are in evidence as exhibits 8 to 15, inclusive, and are made a part hereof by reference.

21. Subsequent to the filing of the claims for refund set forth above, the Commissioner examined them. In connection therewith the Commissioner made a further determination of plaintiff's tax liability for 1921 to 1926, inclusive. Such determination is set forth in a letter dated March 19, 1938, for 1921 and July 25, 1939, for the years 1922 to 1926, inclusive. These letters are made a part hereof by reference. During 1940 the Commissioner made a further determination of plaintiff's tax liability for 1922 and 1923. This determination is set forth in certificates of overassessments numbered 2151888 and 2151891, respectively. Such certificates are in evidence as exhibits 18 and 19 and made a part hereof by reference. The overassessment of taxes and interest shown on these certificates, together with statutory interest thereon, was refunded to plaintiff by two checks dated May 20, 1940, and in the amounts of $100,112.72 for 1922 and $39,646.49 for 1923. In making the various determinations set forth in this finding, the Commissioner, following his original position, computed depreciation, gains, and losses by using the cost of the assets to Ford Motor Company (Michigan).

22. In the determinations referred to in the preceding finding, the Commissioner made allowances in full or in part of several of the items embraced in the claims for refund listed in Finding 20; such allowances are by reference made a part of this finding and the same will be reflected in any recomputations which the court may order.

23. July 12, 1938, the Commissioner rejected the claims for refund filed for 1921. December 18, 1939, the Commissioner rejected the claims for refund filed for 1924, 1925, and 1926. June 6, 1940, the Commissioner rejected the claims for refund filed for 1922 and 1923. At the time the Commissioner acted on the claims for refund for 1922 and 1923 part of these claims was allowed, as stated in Finding 21, but that part of the claims relating to the question of depreciation presented by Finding 19 was rejected.

24. The records, findings, and the decisions in the cases of *Ford Motor Co.* v. *United States*, 81 C. Cls. 30, and *James*

Couzens v. *Commissioner*, 11 B. T. A. 1040, are by reference made a part of the evidence in these cases.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The Ford Motor Company (Michigan) was on and prior to May 1, 1920, a wholly owned subsidiary of plaintiff, the Ford Motor Company (Delaware) which, also, was the parent corporation of a large number of other affiliated corporations during the taxable years 1921 to 1926 inclusive.

May 1, 1920 plaintiff, being the owner of 100 percent of the stock of the Michigan corporation, liquidated this wholly owned subsidiary by surrendering all of its capital stock (except 3 qualifying shares) in exchange for all of its assets. Under the pertinent statute and the applicable decisions, this liquidation by plaintiff of the subsidiary was a taxable transaction. In May 1939 the defendant, through a decision and determination of the Commissioner of Internal Revenue so determined, and on that basis another suit by plaintiff for 1920 for an alleged overpayment on other grounds was settled and dismissed on the understanding and stipulation in open court that plaintiff realized a liquidation profit from such liquidation not greater than $6,315,781.98 on which there was a deficiency tax (though barred) sufficient to offset the claimed overpayment (on other grounds) sued for in that case (No. 43806) in the amount of $3,879,039.98, plus interest collected of $485,182.18.

On May 1, 1920 the depreciable assets acquired by plaintiff from the Michigan corporation on liquidation had a stipulated fair market value of $40,387,694.43 in excess of the cost of such assets to the liquidated Michigan corporation.

In making consolidated tax returns for the years 1921 to 1926 inclusive on which income and profits taxes of $117,-213,605.24 were paid, plaintiff computed its deductions for depreciation on account of the assets acquired in liquidation May 1, 1920, on the amount then determined by plaintiff as the actual fair market value of such depreciable assets on May 1, 1920. It also used the same basis for 1920. When the Commissioner of Internal Revenue audited the returns

for 1921 to 1926 here involved, he then declined to approve this basis for depreciation purposes and instead computed and allowed the depreciation deductions on the basis of cost of such assets to the liquidated Michigan corporation. This action, taken with respect to the taxable years during the period 1926 to 1931, resulted in additional taxes or deficiencies for the years 1921 to 1926 inclusive as finally determined, assessed, and collected in the total amount of $3,211,450.70, and interest also collected in the amount of $784,452.68, making a combined total of $3,995,903.38 (Finding 18). As a result of this action and on account of this additional tax and interest these suits were brought.

The action of the Commissioner in holding that plaintiff was required to use actual cost to the liquidated corporation instead of actual fair market value on acquisition of the assets was based on the erroneous conclusion that since the Michigan corporation was a wholly owned subsidiary the liquidation of that corporation and the acquisition by plaintiff of ownership of all of its assets in exchange for the surrender of its entire capital was an intercompany transaction and that because of this a different basis for the purpose of depreciation was not permissible.

Timely and proper refund claims were filed by plaintiff, all of which were rejected, after suits were instituted, in so far as they asserted the right to depreciation deductions on a basis other than cost to the liquidated corporation.

Upon the facts set forth in the findings the amounts of the overpayments for the years 1921 to 1926, if plaintiff is entitled to compute depreciation as claimed, are less than those claimed in the petitions because the defendant has allowed and paid certain items of the refund claims, other than as to depreciation, and because the amount of the depreciation deduction for each of the years involved on the basis of the stipulated actual fair market value of depreciable assets is less than the depreciation deductions claimed in the petitions on a higher alleged fair market value.

Section 202 of the Revenue Act of 1918 (40 Stat. 1057) which governs the transaction which occurred May 1, 1920, provided that when property is exchanged for other property, the property received in exchange shall for the purpose

of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value. Under the rule announced and applied in *Burnet* v. *Aluminum Goods Company*, 287 U. S. 544, decided after the defendant determined and collected the additional taxes for the years here involved, the 1920 transaction in which plaintiff liquidated a subsidiary and acquired all of its assets in exchange for its stock was such a transaction as, under the law, gave rise to a taxable profit or a deductible loss. From this and from other provisions of the statutes and the regulations relating to deductions for depreciation, it follows that plaintiff is and was entitled to use as the basis for its deductions for depreciation for the years involved the actual fair market value of the depreciable assets acquired May 1, 1920. Compare, *Heiner* v. *Tindle*, 276 U. S. 582; *Brewster* v. *Gage*, 280 U. S. 327; *Hartley* v. *Commissioner*, 295 U. S. 216; *Maguire* v. *Commissioner*, 313 U. S. 1; *Helvering* v. *Gambrill*, 313 U. S. 11. Prior to that date plaintiff had no ownership interest in the properties of its subsidiary. *Klein* v. *Board of Supervisors*, 282 U. S. 19, 24. On and after that date, however, it owned them outright and then became entitled to depreciate them for tax purposes on the basis of their actual value, which value the law made the basis of the determination of profit or loss for tax purposes. Although affiliated, plaintiff and its subsidiaries were at all times separate taxpayers, *Swift & Co.* v. *United States*, 69 C. Cls. 171. There was nothing in the consolidated returns provisions of the 1918 Revenue Act (Section 240) which gave the parent corporation any ownership interest in the assets of a subsidiary, or for tax purposes, other than as to invested capital (a purely statutory concept), treated property acquired in liquidation in exchange for stock as having theretofore belonged to the stockholder. Section 331 of the Revenue Act of 1918 related only to the determination of "invested capital" for the purpose of the excess profits tax credit against net income after all allowable deductions for depreciation and other expenses permitted by other sections had been taken from gross income. It had no effect upon the determination of *net income*. Moreover, it ceased to have any effect when the excess profits tax was repealed by the Revenue Act of 1921.

There is no dispute between the parties as to the fair market value on May 1, 1920, being the proper basis for computation of the annual deductions for depreciation if the fact that the corporations were affiliated does not require that plaintiff use cost to the predecessor corporation as the basis.

The defendant cites no case or statutory provision, and we think there are none, which supports the decision of the Commissioner with respect to the depreciation basis used in determining and collecting the additional taxes and interest for 1921 to 1926. *Burnet* v. *Aluminum Goods Co.*, *supra*, and all other decisions of the courts and the Board of Tax Appeals, oppose the position originally taken as to depreciation in these cases. *Cerro de Pasco Copper Corporation* v. *United States*, 82 C. Cls. 442; *H. Lissner Co.* v. *United States*, 52 Fed. (2d) 1058; *Remington Rand, Inc.* v. *Commissioner*, 33 Fed. (2d) 77; *Burnet* v. *Riggs National Bank*, 57 Fed. (2d) 980; *American Printing Co.* v. *United States*, 53 Fed. (2d) 98; *Munising Motor Co.*, 1 B. T. A. 286; *The Walker-Crim Co., Inc.*, 1 B. T. A. 599; *Rouse, Hempstone & Co., Inc.*, 7 B. T. A. 1018; *Monarch Electric & Wire Co.* v. *Commissioner*, 12 B. T. A. 158, affirmed 38 Fed. (2d) 417; *Gould-Mersereau Co.* v. *Commissioner*, 21 B. T. A. 1316, 1326.

In the determination of the additional taxes on account of which recovery is sought, the defendant seems to have placed some reliance upon Section 331 of the Revenue Act of 1918. But such reliance was clearly not justified. The first portion of that section so relied upon wholly related, as its positive language shows, to the matter of *invested capital* only. The decisions are uniform in holding that it has no application to the basis for deductions for depreciation. *Monarch Electric & Wire Co.* v. *Commissioner*, *supra*; *Gould-Mersereau Co.* v. *Commissioner*, *supra*; *Rouse, Hempstone & Co., Inc.*, *supra*, and *American Printing Co.* v. *United States*, *supra*.

Plaintiff is entitled to recover such amounts for the years involved as represent overpayments not barred by limitation by reason of the failure of defendant to compute and allow deductions for depreciation on the actual fair market value of the depreciable assets. These deductions for the years 1921 to 1926, inclusive, should be computed upon the stipulated

value (Finding 19) and judgments will be entered upon the filing by the parties of computations or a stipulation showing the overpayments due.

It is so ordered.

Madden, *Judge;* Jones, *Judge;* Whitaker, *Judge;* and Whaley, *Chief Justice*, concur.

In accordance with the foregoing decision, a computation of the tax liability of plaintiff was filed by the respective counsel, as follows:

No. 55091—an overpayment of additional tax and interest of $526,534.63 for 1921.

No. 45427—an overpayment of additional tax and interest of $347,974.47 for 1922. $375,868.17 for 1923, $243,842.33 for 1924, $293,798.18 for 1925, and $214,223.87 for 1926; a total of $1,475,707.02.

Whereupon, on November 4, 1942, judgment was entered for the plaintiff, as follows:

In No. 45091, judgment for $526,534.63 with interest at 6 per cent per annum from July 13, 1926, as provided by law.

In No. 45427, judgment for $1,475,707.02 with interest at 6 per cent per annum from the dates of payments of the several amounts, as set forth in Finding 18, as provided by law.

STERLING M. PRICE v. THE UNITED STATES

[No. 45675. Decided November 2, 1942]

On Defendant's Demurrer

Suit for services as watchman; statute of limitation.—Where claim first accrued September 12, 1935, and petition was filed April 29, 1942; it is *held* that the claim is barred by the provisions of section 156 of the Judicial code.

Mr. Sterling M. Price pro se.

Mr. Elihu Schott, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion *per curiam*, as follows:

This case comes before the court on the defendant's demurrer to the plaintiff's petition, on the ground that the claim is barred by the statute of limitations, Section 156 of the Judicial Code, 36 Stat. 1139; Section 262, Title 28, U. S. C. 1940 ed., which provides that:

> Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues * * *.

The plaintiff sues for services as a watchman of an automobile parking lot in the City of Denver, Colorado, from March 1, 1935, to September 12, 1935, the parking lot being under the direction and supervision of a custodian, who was also the Collector of Customs of the Port of Denver.

The petition herein was filed April 29, 1942. The claim first accrued not later than September 12, 1935, when services had been concluded, more than six years before the petition was filed.

The case is barred by the statute cited. The defendant's demurrer is sustained and the petition dismissed. It is so ordered.

JAMES W. GROSE v. THE UNITED STATES

[No. 45237. Decided November 2, 1942]

On the Proofs

Pay and allowances; increased retired pay under the act of March 3, 1927; non-commissioned officer retired after June 3, 1916.—Where plaintiff was as of September 2, 1916, placed upon the retired list of the United States Army as sergeant, first class, Medical Department, in which grade and department he was serving at that time, having completed more than 30 years' service (foreign service counted as double time) under the act of March 2, 1907; and where plaintiff's application for retirement was signed and filed on May 12, 1916, and was received in the office of the Adjutant General, Washington,

on June 28, 1916, and approved on July 11, 1916; it is *held* that plaintiff is not entitled to recover the difference between the pay and allowances received by him as a sergeant, first class, Hospital Corps, and the higher pay and allowances of a sergeant in grade 1 (master sergeant) as provided under the act of March 3, 1927, which provided increased retired pay only for noncommissioned officers retired "prior to June 3, 1916."

Same; limitation of 1927 Statute.—The court cannot enlarge the limitation of the act of 1927 so as to extend the benefits thereof to an officer who, after becoming eligible for retirement, made application to retire May 12, 1916, but whose application, because of the distance from Washington, was not approved until after June 3, 1916.

The Reporter's statement of the case.

Mr. Mahlon C. Masterson for the plaintiff. *Messrs. Ansell, Ansell & Marshall* were on the brief.

Mr. H. B. Kline, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff sues under the act of March 3, 1927 (44 Stat. 1356), to recover additional retired pay representing the difference between the retired pay and allowances which he would have received as a master sergeant (first grade) and the retired pay and allowances which he has received as a sergeant, first class, Hospital Corps, on the retired list. The amount of such difference from August 1, 1934, the beginning of the period covered by the petition, to May 31, 1940, is $3,382.56.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff enlisted in the United States Army July 11, 1898, and served under various enlistments until September 2, 1916, when he was retired as sergeant, first class, Medical Department, in which grade and department he was serving at that time, at Augur Barracks, Jolo, Philippine Islands, having completed 17 years, 2 months, and 11 days actual military service under such enlistments, of which 13 years, 2 months, and 8 days counted double for retirement, making a total of 30 years, 4 months, and 19 days of service. He was appointed sergeant, first class, Hospital Corps, U. S. Army, on March 8, 1916.

2. From July 11, 1898, to May 12, 1899, he served unassigned and in Troop M, 7th Cavalry. From April 21, 1900, to April 20, 1903, he served in the Hospital Corps, U. S. Army, and from April 23, 1903, to May 12, 1916, in the Hospital Corps, U. S. Army. While so serving under existing law as sergeant, first class, Hospital Corps, at Augur Barracks, Jolo, Philippine Islands, and receiving the pay and allowances of that grade, plaintiff made written application on May 12, 1916, for retirement. At the time plaintiff had to his credit more than 30 years' military service, counting double time for foreign service. The application was forwarded the next day, May 13, 1916, to the Adjutant General of the Army, Washington, D. C., by the Commanding Officer, with the recommendation that: "I have known Sergeant Grose for nearly six years and know him to be worthy of every consideration for which he asks." The application was received in the office of the Adjutant General, Washington, D. C., on June 28, 1916.

Plaintiff served in Cuba from January 25, 1899, to May 6, 1899; served in China from August 21, 1900, to November 5, 1900; served in the Philippine Islands from November 20, 1900, to October 1, 1902, and from March 28, 1904, to April 23, 1915.

3. After plaintiff had made application for retirement under the act of March 2, 1907 (34 Stat. 1217), the act approved June 3, 1916 (39 Stat. 166), establishing the Medical Department, U. S. Army, became effective. Section 10 (pp. 171, 172) of that Act provided in part as follows:

> The Medical Department shall consist of one Surgeon General, with the rank of major general during the active service of the present incumbent of that office, and thereafter with the rank of brigadier general, who shall be chief of said department, a Medical Corps, a Medical Reserve Corps within the limit of time fixed by this Act, a Dental Corps, a Veterinary Corps, an enlisted force, the Nurse Corps and contract surgeons as now authorized by law, the commissioned officers of which shall be citizens of the United States.
>
> The Medical Corps shall consist of commissioned officers below the grade of brigadier general, proportionally distributed among the several grades as in the Medical Corps now established by law.
>
> * * * * *

The enlisted force of the Medical Department shall consist of the following personnel, who shall not be included in the effective strength of the Army nor counted as a part of the enlisted force provided by law: Master hospital sergeants, hospital sergeants, sergeants (first-class), sergeants, corporals * * * *Provided*, That master hospital sergeants shall be appointed by the Secretary of War, * * * *Provided further*, That original enlistments for the Medical Department shall be made in the grade of private, and reenlistments and promotions of enlisted men therein, except as hereinbefore prescribed, and transfers thereto from the enlisted force of the line or other staff departments and corps of the Army shall be governed by such regulations as the Secretary of War may prescribe: *Provided further*, That the enlisted men of the Hospital Corps who are in active service at the time of the approval of this Act are hereby transferred to the corresponding grades of the Medical Department established by this Act. * * *

After making application for retirement plaintiff continued in active service in the same grade and the same capacity until he was retired September 2, 1916, as hereinafter set forth. Under the last *proviso* above quoted of the act of June 3, 1916, plaintiff automatically on that date became a sergeant, first class, Medical Department.

4. On July 7, 1916, the Adjutant General forwarded plaintiff's application of May 12, 1916, received by him June 28, 1916, to the Surgeon General "to note and return," and on July 10, 1916, the Surgeon General returned the application to the Adjutant General with the endorsement "Noted."

5. In a letter, dated at Washington, on July 11, 1916, the Adjutant General advised the Commanding Officer at Augur Barracks, Jolo, Philippine Islands (through the Commanding General, Philippine Department), that the application was approved.

6. On July 12, 1916, Special Orders No. 161 were issued, reading in pertinent part as follows:

Special Orders) WAR DEPARTMENT
No. 161 *Washington, July 12, 1916.*

* * * * *

19. Sergt. First Class James W. Grose, Medical Department is placed upon the retired list at Augur Bar-

racks, Jolo, P. I., and will repair to his home. The Quartermaster Corps will furnish the necessary transportation and pay the soldier commutation of rations in advance for the necessary number of days' travel, it being impracticable for him to carry rations of any kind. The journey is necessary for the public service.

* * * * *

By order of the Secretary of War:

H. L. SCOTT,
Major General, Chief of Staff.

[Seal]

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

7. Plaintiff was actually retired as sergeant, first class, Hospital Corps, on September 2, 1916, at Augur Barracks, P. I., under the act of March 2, 1907.

8. From September 2, 1916, plaintiff has received retired pay and allowances as a sergeant, first class, Hospital Corps, under provisions of the act of March 2, 1907 (34 Stat. 1217). He claims that by virtue of the act of March 3, 1927 (44 Stat. 1356), he is entitled to be placed in the first grade (master sergeant), and entitled to the retired pay and allowances provided by law for that grade for the period not barred by the statute of limitations, namely, from August 1, 1934, to the date judgment is rendered in the case.

9. If plaintiff is entitled under the act of March 3, 1927, *supra*, to recover the difference between the retired pay and allowances of a sergeant in grade 1 (master sergeant), and the pay and allowances received by him as a sergeant, first class, Hospital Corps, on the retired list, for the period from August 1, 1934, there would be due him to May 31, 1940, an additional retired pay for that period in the sum of $3,382.56. This is a continuing claim.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Under the facts and circumstances as disclosed by the findings, plaintiff's case has strong equity when considered

in the light of the reasons for and the purpose of the Act of March 3, 1927 (44 Stat. 1356), under which he claims. But in view of the fact that plaintiff was retired September 2, 1916, and in view of the positive provision of that act that only "sergeants, first class, Hospital Corps, retired prior to June 3, 1916," should be placed in the first grade (Master Sergeant) on the retired list, the court can not give plaintiff judgment for the difference between the retired pay of a master sergeant and that of a sergeant, first class.

The Act of March 3, 1927, *supra*, is in full as follows:

> That the following noncommissioned officers on the retired list of the Regular Army are placed in the first grade: Post ordnance sergeants, post commissary sergeants, and post quartermaster sergeants on the retired list; electrician sergeants, first class, Coast Artillery Corps, retired; quartermaster sergeants, Quartermaster Corps, retired prior to June 3, 1916; hospital stewards retired prior to March 2, 1903, and sergeants, first class, Hospital Corps, retired prior to June 3, 1916.

The act is unambiguous. It definitely fixes the dates prior to which the officers named must have been retired in order to become entitled to the retired pay of one grade above that held by them at the time they were retired.

Plaintiff contends that he comes within the spirit of the act of 1927 and within the intention of Congress when the statute was enacted; that under the rule that courts are not always confined to the written word and a case may be within the meaning of the statute and not within its letter, the court should sustain his claim for additional retired pay under the act. We think the rule relied upon, and sometimes applied in proper cases, is not applicable and can not be applied here.

In order to bring plaintiff's claim within the act of 1927 it would be necessary to construe the phrase "Sergeants, first class, Hospital Corps, retired prior to June 3, 1916," as if it read, "retired, or who made application for retirement, prior to June 3, 1916." The language used in the act expresses a clear and definite intention, which does not embrace plaintiff's claim, and we can not supply by implication the words necessary to enlarge the intention so expressed. The fact is, as sufficiently appears from the facts and circumstances

and the history of the act of 1927, that Congress thought that it was taking care of all noncommissioned officers who had long and faithfully served and had reached the highest enlisted grades of the services mentioned and who, because of retirement, could not claim or acquire the more liberal benefits of enlisted grades and pay provided by statutes of the dates mentioned in the 1927 act. It would appear that no one thought of a case like that of plaintiff, who in fairness and justice was as much entitled to the retired pay of a sergeant, first grade (Master Sergeant), as a sergeant, first class, who was fortunate enough to get his application for retirement approved prior to June 3, 1916. That probable oversight may have been the reason why the act of 1927 was not made to include such a case.

The report of the Committee on Military Affairs of the House (House Report 2081, 69th Congress, 2nd Session) stated in part as follows:

> In conformity with law, these men were placed upon the retired list in the grades that they held at the time of their retirement from active service. At that time these grades were among the highest enlisted grades in the service, appointments thereto being made only from the applicants of excellent character and several years' service who had satisfactorily passed an examination for the particular grade. The duties involved and the responsibilities entailed equaled, and in some cases, surpassed, those of the enlisted men of the present first grade in active service.
>
> * * * * *
>
> These noncommissioned officers are in the second and third grades in conformity with a decision of the Comptroller General, which he has declined to change upon request of the Secretary of War. His decision governs the disbursing officers. Therefore, if this situation is to be corrected, it must be by act of Congress.

The act of June 3, 1916 (Finding 3) established enlisted grades of Master Hospital Sergeant and Hospital Sergeant, in the Medical Department established by that act, which were above the grade of Sergeant, first class, Hospital Corps, under prior statutes. As pointed out by the Committee, it was for this reason that sergeants, first class, Hospital Corps, and the other noncommissioned officers who had served long and faithfully under the prior less liberal statutes

were retroactively given the benefit of the more liberal provisions of the 1916 act, which, if they had continued to serve under the 1916 act, they doubtless would have received by promotion because of long service. Plaintiff had no knowledge of the new statute until after his application had been approved and was not therefore in a position where, had he known of the act of June 3, he might have withdrawn his application because of the opportunity for advancement in the enlisted grades afforded by that act. But the court can not enlarge the limitation of the act of 1927 so as to extend the benefits thereof to an officer who after becoming eligible for retirement made application to retire May 12, 1916, before enactment of the new statute of June 3, 1916, but whose application, because of the distance from Washington, was not approved until after June 3, 1916.

The facts bring the case within the rule of statutory interpretation set forth in *Denn* v. *Scott*, 10 Peters 524, 527, in which the court said:

> This, it must be admitted, when we consider the mischief the law was probably intended to remedy, is a somewhat technical construction of the act; and cases may be found where courts have construed a statute most liberally to effectuate the remedy, but where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. Where the language of the act is not clear, and is of doubtful construction, a court may well look at every part of the statute; at its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.
>
> We are unable to say why the benefits of this statute were given to those who held under deeds proved by the subscribing witnesses, and withheld from those whose deeds were proved by the acknowledgment of the grantor. In most cases, if not in all, proof by acknowledgment would be deemed more satisfactory than by witnesses; but the legislature having made a distinction between the cases, whether it was intentional or not, reasonable or unreasonable, the court are bound by the clearly expressed language of the act.

Plaintiff's claim does not come within the provisions of the act of 1927 and the petition must be dismissed. It is so ordered.

Madden, *Judge;* Jones, *Judge;* Whitaker, *Judge;* and Whaley, *Chief Justice*, concur.

THE SIOUX TRIBE OF INDIANS, CONSISTING OF THE SIOUX TRIBE OF THE ROSEBUD INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE STANDING ROCK INDIAN RESERVATION IN THE STATES OF NORTH DAKOTA AND SOUTH DAKOTA; THE SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE CHEYENNE RIVER INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE CROW CREEK INDIAN RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE LOWER BRULE RESERVATION IN THE STATE OF SOUTH DAKOTA; THE SIOUX TRIBE OF THE SANTEE INDIAN RESERVATION IN THE STATE OF NEBRASKA; AND THE SIOUX TRIBE OF THE FORT PECK INDIAN RESERVATION IN THE STATE OF MONTANA v. THE UNITED STATES

Land Cession of 1889

[No. C-531 (11). Decided December 7, 1942]

On Defendant's Motion for New Trial

Indian claims; agreement under the Act of March 2, 1889; duty of Government as to proceeds from ceded lands.—Where, under the Act of March 2, 1889, embodying an agreement between the parties to the instant suit, the validity of which is conceded by said parties, all money accruing from the disposal of land therein ceded by the plaintiff tribe was to be paid into the United States Treasury to create a fund to be maintained for the Sioux, or applied to specific purposes for their benefit; it is *held* that the defendant could perform its duty under the agreement as well by expending the money for the plaintiff as

Syllabus

by holding it for plaintiff, and plaintiff is not entitled to recover until and unless it is shown that the defendant has failed to set up said fund, or, having set it up, has failed to use it in accordance with said agreement.

Same; location of western boundary of diminished Sioux reservation.—Where, in the interpretation by certain Government agencies of the treaty of April 29, 1868 (15 Stat. 635), diminishing the Sioux reservation and fixing the western boundary of said reservation at meridian 104° west of Greenwich, it was assumed by such Government agencies that said 104° west of Greenwich was identical with 27° west of Washington, fixed as the western boundary of the Dakota territory by the statute of 1864 (13 Stat. 85) establishing the territory of Montana, and by the subsequent statute of July 25, 1868 (15 Stat. 178) establishing the territory of Wyoming; it is *held* that such assumption was not well founded.

Same.—In the instant case the question at issue is not whether meridian 104° west of Greenwich, named in the treaty of April 29, 1868, as the western boundary of the diminished Sioux reservation, coincided with meridian 27° west of Washington, fixed as the western boundary of Dakota by the statute of July 25, 1868, enacted three months later, and before said treaty was ratified, but the question is whether meridian 103°, named in the agreement and statute of 1877 (19 Stat. 254) as the new western boundary of the new and further diminished Sioux reservation was intended by Congress to coincide with meridian 26° west of Washington.

Same; intention of Congress in Act of 1877.—Where, in the agreement and statute of 1877, meridian 103° west of Greenwich was named as the new western boundary of the new and further diminished Sioux reservation; and where no mention of 26° west of Washington occurred in any contemporaneous treaty or statute; and where there was no mark or line on the ground at said 26°; it is *held* that in the 1877 agreement and statute it was not the intention of Congress that meridian 103° west of Greenwich, as there named, should coincide with meridian 26° west of Washington.

Same.—There is no showing of any dominant purpose on the part of Congress to take from the Indians, in 1877, exactly one degree of longitude; the purpose was to acquire the Black Hills of Dakota, and the gold therein, and it was seen that the approximate location of meridian 103° would accomplish this purpose.

Same.—This location was not intended to be contingent upon the location of some other line 55 miles away. The legislative history shows that Congress was aware, when it considered the agreement and statute of 1877, of the true location of meridian 103° with reference to natural objects such as mountains and rivers.

Same.—Confusion in the mind of the Commissioner of Indian Affairs as to identity of meridians in general, if such confusion existed, would not be sufficient to change the apparently plain meaning of the language of Congress.

Same; administrative construction.—It has not been shown that there has been such administrative construction of the Act of 1877 as would vary the normal meaning of the language of said Act.

The Reporter's statement of the case:

This case, No. C–351 (11), was originally decided December 1, 1941, the court holding that the defendant was accountable, under the agreement of March 2, 1889, for $5,-454,893.00, including the sum of $147,237.22, which was or should have been the proceeds of the 271,482.57 acres in dispute, constituting the narrow strip which lay between the true 103rd meridian and its supposed location a few miles west.

Upon the defendant's motion for new trial, which was granted, the former findings of fact, conclusion of law and opinion were withdrawn December 7, 1942, and the findings of fact, conclusion of law and opinion set forth below were substituted therefor.

Mr. Ralph Case for the plaintiff. *Messrs. James S. Y. Ivins* and *Richard B. Barker* were of counsel.

Mr. Raymond T. Nagle, with whom were *Mr. Assistant Attorney General Norman M. Littell* and *Mr. Clifford R. Stearns*, for the defendant.

The court made special findings of fact as follows, December 7, 1942:

1. Plaintiff's claim is asserted in its petition filed May 7, 1923, as amended May 7, 1934, pursuant to the authority granted by the Act of Congress of June 3, 1920 (41 Stat. 738).

2. The evidence is not sufficient to permit a finding at this time as to which constituent groups of the Sioux Tribe of Indians are affected by the issues involved in this case.

3. By a treaty between the United States and various tribes and bands of the Sioux Nation dated April 29, 1868 (15 Stat. 635), a certain "district of country" in what is now the

States of North and South Dakota, was set apart for the Sioux Nation.

By an agreement [1] ratified February 28, 1877 (19 Stat. 254), that "district of country" was diminished by the cession and relinquishment to the United States of all territory lying outside the reservation "as herein modified and described," the western boundaries of which

> commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek (19 Stat. 254, 255).

The reservation was not otherwise diminished by the agreement. Thereafter, by the Act of March 2, 1889 (25 Stat. 888), certain areas within the reservation, as diminished by the agreement of 1877, were set apart for the occupancy of different groups of the Sioux Indians, the remainder being ceded to the United States for purposes therein mentioned. Section 28 of that Act provided that it should take effect upon the acceptance thereof and consent thereto by the different bands in the manner and form prescribed by the twelfth article of the Treaty of 1868. The Act was accepted and the consent was given. The acceptance and consent were made known by proclamation of the President, February 10, 1890 (26 Stat. 1554). The purposes of the cession, so far as material to the issues raised in this action, as set out in sections 21 and 22 of the Act, were:

> SEC. 21. That all lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain, except American Island, Farm Island, and Niobrara Island, and shall be disposed of by the United States to actual settlers only,

[1] In another case decided by this court on June 1, 1942, *Sioux Tribe of Indians* v. *The United States*, No. C-531-(7),* plaintiff attacked the validity of the agreement ratified February 28, 1877. The finding here made merely refers to that agreement for the purpose of using a description therein, and involves no conclusion as to the validity of the agreement.

*Petition for certiorari denied April 19, 1943.

under the provisions of the homestead law (except section two thousand three hundred and one thereof) and under the law relating to town sites: *Provided*, That each settler, under and in accordance with the provisions of said homestead acts, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, the sum of one dollar and twenty-five cents per acre for all lands disposed of within the first three years after the taking effect of this act, and the sum of seventy-five cents per acre for all lands disposed of within the next two years following thereafter, and fifty cents per acre for the residue of the lands then undisposed of, and shall be entitled to a patent therefor according to said homestead laws, and after the full payment of said sums; but the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged, except as to said sums: *Provided*, That all lands herein opened to settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre, which amount shall be added to and credited to said Indians as part of their permanent fund, and said lands shall thereafter be part of the public domain of the United States, to be disposed of under the homestead laws of the United States, and the provisions of this act; * * *.

SEC. 22. That all money accruing from the disposal of lands in conformity with this act shall be paid into the Treasury of the United States and be applied solely as follows: First, to the reimbursement of the United States for all necessary and actual expenditures contemplated and provided for under the provisions of this act, and the creation of the permanent fund hereinbefore provided; and after such reimbursement to the increase of said permanent fund for the purposes herein before provided.

4. As provided by the Act of March 2, 1889 (25 Stat. 888, 895), the land ceded to the United States was restored to the public domain and opened to settlement under the provisions of the homestead laws. At the end of ten years a large portion of the land remained undisposed of, and was accepted by the United States to be paid for by the United States at fifty cents per acre.

5. The land lying east of the true location of the meridian of longitude 103° west of Greenwich comprised 9,261,592.62 acres, for which, under the terms of the Act of 1889, plaintiff was entitled to a credit of $5,307,655.87.

6. The land lying west of the true location of the meridian of longitude 103° west of Greenwich, and east of meridian 26° west of Washington, which land is claimed by plaintiff but denied by the defendant to have been ceded to the United States by plaintiff under the agreement embodied in the Act of 1889, comprised 271,482.57 acres, for which plaintiff was entitled to a credit of $147,237.22 if this land was ceded by it under the 1889 agreement.

The Court decided that the defendant is accountable, under the agreement of March 2, 1889, for $5,307,655.87, but the case was remanded to the general docket for further proceedings in accordance with the opinion of the court.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff sues because, it alleges, the defendant has failed to perform its obligations under its agreement with plaintiff as set forth in the Act of March 2, 1889 (25 Stat. 888).

By a treaty of April 29, 1868 (15 Stat. 635), between the parties herein there was set apart as a reservation for the Sioux Indians a large area in what are now North and South Dakota. A later "agreement" was made between the parties and embodied in an act of February 28, 1877 (19 Stat. 254), the validity of which was attacked by plaintiff in another case recently decided by this court.[3] By that transaction, the western boundary of the reservation was said to be moved east to the one hundred and third meridian of longitude except for the distance between the north and south forks of the Cheyenne River which flowed to their confluence east of that meridian. For that distance the two streams down to their confluence were to constitute the western boundary of the reservation.

By an act of March 2, 1889, which embodied an agreement between the parties, the validity of which is conceded by both parties, certain areas of the diminished reservation were set apart for various groups of the Sioux. The remainder of

[3] Note 1, ante.

the reservation land was ceded to the United States for purposes described in the act. The ceded land was to be restored to the public domain and opened for settlers, and the settlers were to be charged a specified amount per acre, and such land as was not sold within ten years was to be taken by the United States at a specified price. All money accruing from the disposal of the land was to be paid into the Treasury to create a fund to be maintained for the Sioux or applied to specified purposes for their benefit.

Plaintiff claims that the fund was never fully set up and that much of what was set up has been misappropriated by the defendant.

At this stage of the case, not much is ripe for decision, even under Rule 39 (a) of this court. As to $5,307,655.87, the proceeds of 9,261,592.62 acres of the lands covered by the agreement, the parties do not dispute that the defendant was under a duty to put that amount in plaintiff's fund, and to hold it or expend it for plaintiff's benefit pursuant to the agreement. But that fact, in itself, does not create even a *prima facie* liability on the part of the defendant in this suit. The defendant could perform its duty under the agreement as well by expending the money for plaintiff as by holding it for plaintiff. The defendant has offered a report of the General Accounting Office showing in detail the receipts and expenditures on account of the fund, which the defendant claims proves that it has more than performed its obligations under the contract. Plaintiff contends that this offer is premature; that under Rule 39 (a) plaintiff is entitled to a judgment, and that thereafter the defendant may put in offsets to reduce the amount of the judgment.

As we have indicated above, we disagree with plaintiff. Plaintiff does not make out its case until it shows that the defendant has failed to set up the fund, or, having set it up, has failed to use it in accordance with the agreement. Before we can decide whether the contract has been breached, plaintiff must show that the General Accounting Office report is wrong, or that the disposition of the funds as there shown was not in accord with the agreement.

There is, however, one element of the case which is ripe for decision. As we have said, the parties agree that the defendant received 9,261,592.62 acres under the cession, and

that $5,307,655.87 should have gone into the fund as the proceeds of those acres. Plaintiff contends however that 271,482.57 additional acres were ceded, whose proceeds were $147,237.22, which should have been but was not put into plaintiff's fund. The defendant denies that these acres were ceded, contending that plaintiff did not own them at the time of the agreement of 1889 because it had already ceded them to the United States by its agreement ratified February 28, 1877. See Finding 3.

Plaintiff claims that, though for the purposes of this case it may be assumed that what plaintiff ceded in 1889 included no lands lying west of the western boundary of the Sioux reservation as diminished by the agreement of 1877, and though the agreement of 1877 in terms fixed meridian 103° as that western boundary, and though the acres here in dispute lie west of meridian 103° as accurately located, yet these acres still belonged to plaintiff in 1889, and were ceded by the agreement of that year.

Plaintiff's exposition of this seeming paradox is as follows. When Congress, in the Act of 1877 diminishing the former Sioux reservation, set the new western boundary of the diminished reservation at meridian 103°, it really meant meridian 26° west of Washington, because it erroneously assumed that meridian 103° west of Greenwich was identical with 26° west of Washington. Since there were no marks on the ground indicating the intended boundary, and since there had been no survey to fix the location of meridian 103°, the Sioux had no intention one way or another in making the agreement. In that situation the intention of Congress is controlling, at least if to depart from it would prejudice the other party to the agreement. Hence, plaintiff says, the real western boundary of the diminished Sioux reservation fixed by the agreement of 1877, was as Congress intended, the line of meridian 26° west of Washington. But that was in fact 3′2.3″, or, at that latitude, about two and one-half miles, west of true meridian 103°. From this discrepancy resulted the strip of land, two and one-half miles wide and extending north and south the entire length of the western boundary of the reservation, except for the distance that that boundary ran along the North and South Forks of the Cheyenne River to their confluence.

Plaintiff's explanation of this alleged error of Congress is that Major L'Enfant, in laying out the District of Columbia, placed the east and west center of the White House and the center line of Sixteenth Street, Northwest and Southwest, exactly on what he supposed to be meridian 77° west of Greenwich; that in fact this line lay 3′2.3″, west of meridian 77°, but that the error was not discoverable until the laying of the Atlantic Cable so that time could be transmitted instantaneously from Greenwich to Washington, and was not officially discovered until 1882; and that in the meantime in all surveys made by the Government it was assumed that, in order to properly locate any meridian west of Greenwich, the surveyor need only add 77° to his measurement west from Washington.

Plaintiff's principal authority for this asserted history is the report of the General Accounting Office, filed in this and other related suits of plaintiff in this court.

A part of that report appearing in Vol. I, pp. 402–404, is as follows:

> In connection with the eastern and western boundaries of the Great Sioux Reservation as it existed at the time of the passage of the aforesaid act of March 2, 1889, i. e., the ninety-ninth and one hundred and third degrees of longitude west of Greenwich, respectively, as discussed on this and the preceding pages 400 and 401, an examination of the maps of the Territory of Dakota on file in the General Land Office, disclose that prior to 1879 the ninety-ninth and one hundred and third degrees of longitude west of Greenwich were considered as being identical with the twenty-second and twenty-sixth degrees of longitude west of Washington, respectively. It appears that all meridians were placed on said maps on the assumption that the Meridian of Washington was located 77° west of Greenwich, whereas its true location, as shown by "U. S. Geological Survey Bulletin No. 817, second edition, 1930," page 206, is 77°3′2.3″ west of Greenwich.
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> On the map of 1879 of the Territory of Dakota (Map No. 10, Territory of Dakota, sheet 2, a record of the General Land Office) the ninety-ninth degree of longitude west of Greenwich was placed on the true location of the twenty-second degree of longitude west of Washington, but the twenty-second degree of longitude west of Washington was placed to the west of its true loca-

tion. However, beginning with the year 1882, on all maps of the General Land Office, meridians of west longitude, or meridians west of Greenwich, were placed on their true locations. For the purpose of this report, those tracts of land falling between the boundaries defined in terms of degrees of west longitude as located on maps of the Territory of Dakota prior to 1882 and the boundaries as located on maps of said territory subsequent to 1882, are designated as "alternate tracts," the area of which should be excluded from, or included within, the boundaries defined by the Treaty of April 29, 1868, 15 Stat. 635, the Executive order of January 11, 1875, 1 Kappler 898, the act of February 28, 1877, 19 Stat. 254, the Executive order of August 9, 1879, 1 Kappler 899, the Executive order of March 20, 1884, 1 Kappler 884, and the aforesaid act of March 2, 1889, according to whether the location of meridians as set out on maps of the Territory of Dakota prior to 1882, or subsequent to 1882, is used.

To some extent the General Accounting Office, and to a greater extent plaintiff's counsel, in reliance upon and elaboration of that office's report, seem to have fallen into historical error. L'Enfant's plan shows that he proposed two different locations for zero meridians for Washington, neither of which passed through the White House. The plan shows a square about a mile east of the Capitol, and a marginal reference to the square which says

B. An historic Column, also intended for a Mile or itinerary Column, from whose station (a mile from the Federal house) all distances of places through the Continent are to be calculated.[3]

On the plan L'Enfant also marked the longitude of the "Congress House" as zero. The plan does not indicate that its draftsman was computing these locations in any relation to meridians west from Greenwich, or any other point. It was customary at this time for each nation to measure from its own meridian, usually one through its capital. This custom persisted until 1884 when an international conference, called by the President of the United States pursuant to a

[3] Manual of Origin and Development of Washington, Senate Doc. 178. A facsimile of the plan and a typed transcription of the notes inscribed thereon appear at pp. 26–27, Sen. Doc. 178, 75th Cong., 3d sess., Cong. Doc. Series No. 10242.

Joint Resolution of Congress of 1882, agreed upon the use of the meridian of the Royal Observatory at Greenwich England.[4] As we shall see, measurement from Greenwich began to be practiced in this country earlier than 1882.

Pursuant to the L'Enfant plan, one Andrew Ellicott laid out the streets, avenues, and reservations of the City of Washington in 1792, drawing a meridian through the Capitol Building site.[5] Not until 1804 was the White House meridian located. In that year a surveyor named Nicholas King, under the direction of Mr. Brigg, perhaps at the request of President Jefferson, located a meridian from the center of the front door of the White House, and marked its location on the hill north of the White House on Sixteenth Street, and its intersection with a line due west from the Capitol, near where the Washington Monument now stands.[6] There was no indication that anyone supposed that the center of the front door of the White House happened to lie exactly on meridian 77° west of Greenwich, or in any other particular relation to that meridian.

None of these Washington meridians seem to have been used in the description of boundaries of territories until after 1850. The descriptions named meridians west of Greenwich. In 1850 the meridian of the old Naval Observatory located at 24th Street Northwest near Constitution Avenue was established by Act of Congress as the zero American meridian for astronomical purposes, while the Greenwich meridian was directed to be used for nautical purposes (9 Stat. 513, 515). This observatory was about half a mile southwest of the White House and its location was established as early as 1845 as 77°3′39.6″ west of Greenwich,[7] which location was not far from correct, though it must have been established

[4] "American Prime Meridians," by Joseph Hyde Pratt, of U. S. Geological Survey, Geographical Review, April 1942, Def. Ex. L; "Surveys and maps of the District of Columbia," by Marcus Baker, The National Geographic Magazine, vol. 6, January 1894, to May 1895, pp. 149, 169, Def. Ex. K; "Meridians of Washington," by Frank L. Culley, Geodetic Letter No. 1, vol. 3, March 1936, p. 56, published by Division of Geodesy, U. S. Coast and Geodetic Survey, Def. Ex. J.

[5] Op. cit. note 3 ante, pp. 30–31.

[6] Op. cit. note 4 ante.

[7] See Defendant's Exhibit M, a letter from J. F. Hellweg, Captain, U. S. N. (Ret.), Superintendent of the U. S. Naval Observatory, citing the first volume of the Observatory publications, that for 1845.

by the comparison of mariners' chronometers, as the Atlantic Cable had not yet been laid.

In 1864, Montana (13 Stat. 85, 86), and in 1868 Wyoming (15 Stat. 178) were carved out of the old Dakota territory, by descriptions fixing their eastern boundaries as 27° west of Washington. The date of the Wyoming statute is July 25, 1868. On April 29, 1868 and thereafter a treaty was negotiated with the several tribes of the Sioux diminishing their reservation and fixing the western boundary of it at meridian 104° west from Greenwich (15 Stat. 635). This treaty, it will be observed, fixed the western boundary of the new Sioux reservation at meridian 104°, the true location of which was 3′2.3″ or some two and one-half miles east of the new western boundary of Dakota Territory, which was to be fixed by statute enacted three months later and before the treaty was ratified. The result, unless meridians 27° and 104° were regarded as identical, was to leave inside the Territory of Dakota but west of the Sioux reservation a long, narrow, inaccessible strip along the whole western boundary of what is now South Dakota, difficult to govern and equally difficult to rationalize. Plaintiff urges this situation as proof that, at this time, the Government assumed as a fact that meridian 27° west from Washington coincided with 104° west from Greenwich. Plaintiff further points out that in 1875 when the Allison Commission was appointed to confer with the Sioux to negotiate a cession of the Black Hills country to the United States, the Commissioner of Indian Affairs, in his instruction to the Treaty Commissioners wrote:

> That portion of the Black Hills country which lies within the boundaries of Dakota is, without dispute, a part of their permanent reservation.

This statement means that the Commissioner of Indian Affairs thought that the western boundary of the then Sioux reservation coincided with the western boundary of Dakota.

These circumstances point strongly to the fact that there was confusion or carelessness on the part of those in the Government dealing with Indian affairs about these boundaries, and that what one part of the Government, the Naval Observatory, knew very well, another agency of the Government having to do with Indian affairs overlooked. But

our question here is not whether meridian 104° west of Greenwich, as named in the treaty of 1868, coincided with meridian 27° west of Washington, fixed as the western boundary of Dakota by the 1868 statute creating the territory of Wyoming. It is whether meridian 103°, named in the agreement and statute of 1877 as the new western boundary of the new and further-diminished Sioux reservation coincided with meridian 26° west of Washington in the mind of Congress in 1877. No mention of 26° west of Washington occurred in any contemporaneous treaty or statute. There was no mark or line on the ground at 26°. Did meridian 103° as named in the agreement of 1877 mean 26° west of Washington because meridian 104° meant, and we assume for the purpose of this discussion that it did mean, 27° west of Washington when it was named nine years before? We think not.

Let us first assume that meridian 103° as named in 1877 was a pure abstraction. Before its meaning on the ground could be determined, there would have to be a fixing of its location by astronomical means and time computation. The art and the knowledge necessary to do that were fully available. This abstract line, then, when it should be reduced to reality, would be on the true line of meridian 103° and there would be no probability, barring mechanical errors, of its being somewhere else. There is no showing of any dominant purpose on the part of Congress to take from the Indians, in 1877, exactly one degree of longitude. The purpose was to acquire the Black Hills and their gold. It was seen that the approximate location of meridian 103° would accomplish this purpose, as well as giving convenient access to the gold. This location was not intended to be contingent upon the location of some other line fifty-five miles away. And some confusion in the mind of the Commissioner of Indian Affairs as to identity of meridians in general, if such confusion existed, would not be sufficient to change the apparently plain meaning of the language of Congress. It should be noted that the Commissioner's mistake, disclosed by his instructions to the Treaty Commissioners quoted above, may have resulted from his being unaware that the Wyoming statute and the Sioux Treaty, both of 1868, did not name the same meridians.

In what we have said we have assumed that Congress in 1877 named meridian 103° as a mere abstraction, to be located on the ground at some later time. In fact Congress had available in 1877 a good deal of information as to where meridian 103° actually lay. In 1875 a party known as the Jenney Expedition had been sent to investigate the Black Hills, in view of the discovery of gold there. A topographer and an astronomer were added to the party. The astronomer, by astronomical observations, located more than seventy distinct points of longitude measured from Greenwich, and came out with material for making a map.[8] Such a map was made, showing the principal natural objects and their location with reference to Greenwich meridians.[9]

In the meantime, also beginning in 1875, a commission was appointed by the Secretary of the Interior, at the direction of the President, to negotiate with the Sioux about the relinquishment of the lands.[10] Senator Allison of Iowa was Chairman of the Commission. In March 1876 Senator Allison introduced a bill in the Senate providing for the negotiation of an agreement with the Sioux for a part of their reservation. The bill was referred to the Committee on Indian Affairs of which Senator Allison was Chairman.[11] April 18, 1876, Senator Allison submitted and the Senate adopted a resolution calling upon the Secretary of the Interior for the report of the Jenney Expedition. As much of the report as was ready was submitted, with a preliminary map showing, as we have said, locations with relation to meridian 103°.[12] This report was received by the Senate and printed for the use of the members.[13]

Senator Allison's bill did not pass, but the Senate Committee on Appropriations, of which Senator Allison was a member, amended a House bill making appropriations for the Indians, so as to require that the Sioux, in order to receive more than half the money appropriated for them, must

[8] Newton & Jenney, Geology of the Black Hills of Dakota, U. S. Geog. & Geol. Survey, 1880, pp. 18–19.
[9] Sen. Ex. Doc. 51, 44th Cong., 1st sess., Cong. Doc. Series 1664.
[10] Report, Commissioner Indian Affairs, 1875, p. 184.
[11] Cong. Rec., 44th Cong., 1st sess., p. 1662.
[12] Sen. Ex. Doc. 51, 44th Cong., 1st sess., Cong. Doc. Series 1664.
[13] Cong. Rec., 44th Cong., 1st sess., pp. 2709, 2729.

agree to relinquish that part of their reservation lying west of meridian 103°.[14] This amendment, in substance, was accepted in conference.[15] A commission was appointed which negotiated an agreement with the Sioux and reported back December 18, 1876. A bill to ratify it was introduced in the Senate.[16]

On January 16, 1877, the Secretary of the Interior transmitted to Senator Allison, Chairman of the Committee on Indian Affairs, the final report of the Black Hills expedition of 1875, together with plates, maps, and illustrations, and a request of Professor Jenney that they be published.[17] A similar communication and request was sent to the Speaker of the House, where it was referred to the Committee on Indian Affairs and ordered printed.[18]

The map transmitted in 1877, like the 1875 preliminary map, showed the meridians west of Greenwich including meridian 103° in relation to mountains, rivers, valleys, and other natural objects. On January 26, 1877, Senator Allison introduced, at the instruction of the Committee on Indian Affairs, the bill to ratify the negotiated agreement.[19] This bill became the Act of February 28, 1877 (19 Stat. 254), whose interpretation is here in question.

In this condition of the record, we cannot say that Congress did not mean what it said when it named meridian 103°. To give the words the meaning urged by plaintiff would shift the line to the west, in contradiction to its location on the map which Congress had before it for consideration, and throw the line out of relation to the natural objects shown on that map.

Plaintiff argues that the administrative construction put upon the 1877 agreement is in accord with plaintiff's contention. It says that the lands within the narrow strip, which, according to the view which we take, were relinquished by plaintiff in 1877 and thereby became a part of the public

[14] Cong. Rec., 44th Cong., 1st sess., p. 3902.
[15] Id., p. 5596.
[16] Cong. Rec., 44th Cong., 2d sess., p. 983.
[17] Sen. Misc. Doc. 41, 44th Cong., 2d sess., Vol. 1, Cong. Doc. Series No. 1722.
[18] Cong. Rec., 44th Cong., 2d sess., p. 707.
[19] Senate Bill 1185, Cong. Rec., 44th Cong., 2d sess., p. 983.

lands and open for settlement as such, were not in fact treated as a part of the public lands until after the agreement of 1889, which, of course, relinquished them if they had not been relinquished in 1877. Thus, plaintiff says, the Government showed that it interpreted the 1877 agreement as plaintiff urges us to interpret it.

It is true that none of these lands within the strip were entered before 1889, or, in fact, before 1893. But they seem not to have been surveyed and platted for such entry until 1892, and hence could not have been so entered. Plaintiff urges that the Comptroller General's report in this case shows that when these lands were entered, subsequent to 1893, they were entered under the Act of 1889, i. e., as lands formerly of plaintiff, and not as ordinary public lands. The Comptroller General's report seems to indicate the contrary. That report seems to distinguish between the lands within the strip which it says were sold as "public lands" and the lands clearly derived from plaintiff which it says were sold "under Section 21 of the Act of March 2, 1889."

We think plaintiff has not shown an administrative construction of the Act of 1877 which would vary the normal meaning of its words.

We conclude, therefore, that as to the 271,482.57 acres of land within the strip, the defendant is not accountable. The defendant is, however, accountable for $5,307,655.87, the proceeds of the 9,261,592.62 acres of land here involved, and lying east of the true line of meridian 103° west of Greenwich. The defendant's motion for a new trial is granted, the former findings of fact, conclusion of law, and opinion are withdrawn. The foregoing findings of fact, conclusion of law, and opinion are substituted for those withdrawn.

The case is remanded to the General Docket for further proceedings in accordance with this opinion. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

HARRIS WRECKING COMPANY v. THE UNITED STATES

[No. 43468. Decided December 7, 1942]

On the Proofs

Government contract; responsibility for protection of property pending wrecking operations to clear site of Government building.—Where plaintiff was awarded contract for clearing site of Government building; and where contract required plaintiff to pay agreed amount for all material removed and to post performance bond, all of which plaintiff did; it is *held* that under the terms of said contract defendant was obligated to use reasonable care to preserve such material in good condition until plaintiff's bond was approved and notice to proceed given, and since defendant failed to do so plaintiff is entitled to recover for damages to such material incurred between the time plaintiff's bid was accepted and the time possession was given to plaintiff.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *Messrs. King & King* were on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a corporation of the State of Illinois, with principal place of business at Chicago.

2. In response to an invitation for bids the plaintiff submitted a bid to the Supervising Architect of the Treasury Department November 21, 1932, for clearing the site for a new post office building at Cambridge, Massachusetts, according to specifications. In this bid plaintiff proposed to pay the United States $537.00. The specifications provided that all material removed, including plumbing fixtures, heating apparatus, lighting fixtures, ceiling fans, lifts and elevators, and similar mechanical equipment permanently attached to the land or structures was to become the property of the successful bidder.

3. The bid was accepted by the Supervising Architect November 26, 1932, and plaintiff paid the agreed sum of

$537.00 to the defendant. On December 8, 1932, the plaintiff furnished the performance bond. On January 6, 1933, the Supervising Architect approved plaintiff's bond and notified plaintiff to proceed with the work, and on January 9, 1933, the plaintiff notified the Supervising Architect that wrecking operations would begin immediately. The Government turned the buildings over to the plaintiff January 9, 1933.

The buildings to be demolished and cleared away were stores, houses, and apartments, all Government property. One building was new and had never been heated. The others were buildings of various ages, none of them modern. They had been taken over by the Government and tenants had, with the exception of one tenant in the new building, all vacated by the end of November 1932.

Prior to bidding plaintiff's representative visited the site and the bid was based on the inspection then made. Nothing out of the ordinary was visible on this inspection.

There was no written contract beyond the specifications, the bid and acceptance thereof. Copies of the specifications, bid and acceptance are in evidence and made a part hereof by reference.

4. Plaintiff proceeded with the work of demolition and attempted to sell the heating fixtures. The purchasers discovered that some of them were cracked and could no longer be used for the purpose for which they had been made, and plaintiff had to dispose of them as junk.

The material so cracked and ruined had not been drained of water by the defendant or the water therein kept by defendant at a temperature above freezing, during the period between acceptance of bid and order to proceed with the work. Sub-freezing temperature intervened during this period, froze the water in pipes, radiators, and heaters and the expanding ice cracked them.

5. The material so disposed of by the plaintiff as junk brought plaintiff a return of $92.75 from the purchaser, the best price plaintiff could obtain. The reasonable market value of this material, not damaged as described, would have amounted to $1,573.62, a net loss to the plaintiff of $1,480.87.

Plaintiff's bid was based on heating fixtures undamaged by frost.

On January 27, 1933, the plaintiff submitted a claim to the Supervising Architect in the sum of $1,500.00 for this loss. The Treasury Department entertained the claim and on March 1, 1933, the Assistant Secretary of the Treasury wrote plaintiff as follows:

> Reference is made to previous correspondence and particularly to your letter of January 27, 1933, making claim, in amount $1,500, on account of the alleged damage to pipes, etc., in the premises located on the Post Office site at Cambridge, Massachusetts.
>
> A copy of your letter was forwarded the Custodian of said site with the request to report fully in the premises as to just what was done to prevent damage to the plumbing, etc.
>
> The Department is now in receipt of a reply wherein he states, among other things, that
>
> "On January 9, 1933, the keys were turned over to Mr. Harris of the Harris Wrecking Co. Foreman Callahan, who acted for me in this matter, visited the premises with Mr. Harris and Foreman Wristo of the Harris Wrecking Co. Mr. Harris and Mr. Wristo made a survey of the premises on this day, January 9, and no such damage was noted at that time except the hot water fronts in coal ranges at 409 Green St. had been frozen. I was told by Mr. Harris that the property was in good order, better than is usual in cases of this sort. Mr. Harris expressed his thanks for our care of the property. Mr. Wristo, Foreman for the Harris Wrecking Co. was in Cambridge for about ten days prior to final notice, making contacts, and he knows that we made every effort to protect this property.
>
> "We have had contact with Mr. Starr every day since he has been here, and the first report we received on damage was on February 1, 1933, when Mr. Starr asked Mr. Callahan to look over some radiators at 409 Green St. that did show signs of being cracked. This house had heat with hot water furnace in two lower apartments only; five rooms in each apartment. Mr. Starr also showed four or five radiators that had been removed from one of the other apartments that showed signs of being cracked as though from freezing. This is all the damaged property that was shown."
>
> In view of the foregoing, the Department feels that reasonable care was taken to protect the premises and is of the opinion that you have no claim against the Government.

A copy hereof has been forwarded the Custodian of said site for his files.

The statement that reasonable care was taken to protect the premises was contrary to the facts.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

In response to an invitation for bids the plaintiff on November 21, 1932, submitted a bid for clearing the site for a new post office building at Cambridge, Massachusetts, according to specifications. The specifications provided that all materials removed, including plumbing fixtures, heating apparatus, lighting fixtures, ceiling fans, lifts, and elevators, were to become the property of the successful bidder. The fixtures in question were attached to the property.

Of the 14 bidders the plaintiff was the only one that offered to pay the United States in addition to furnishing all labor, equipment, and materials, and performing all work required for clearing the site in accordance with the specifications. It expected to secure its compensation from the disposal value of the equipment in the buildings.

The bid was accepted by the Supervising Architect on November 26, 1932. On January 6, 1933, the Supervising Architect approved plaintiff's bond and notified plaintiff to proceed with the work.

The plaintiff advised the Supervising Architect that wrecking operations would begin immediately. The Government turned the buildings over to plaintiff on January 9, 1933.

Between the time the bids were made and the time the bond was approved and notice to proceed given, the radiators were not drained and they, together with other parts of the heating apparatus, were allowed to freeze, which caused them to crack and become useless. The undisputed testimony shows that at the time the bids were made the value of the property thus damaged was $1,573.62. It was necessary to sell the damaged property as junk, and as such it brought the sum of $92.75, a net loss to the plaintiff of $1,480.87, for which plaintiff sues.

The defendant admits the damage, but claims that immediately upon the execution of the contract the plaintiff not only became the owner of the property, but was solely responsible for the care and protection of the same. The record does not support this contention in any respect.

At the time the bids were accepted the buildings in question were occupied, but soon thereafter notice to vacate was given the tenants, and by December 12 all of them had vacated the property. At that time the custodian for the Treasury Department posted a sign on the property to the effect that it belonged to the United States Government, and that trespassers would be prosecuted. He closed the buildings and locked the doors and windows, nailing up any doors and windows on which the locks were broken. The buildings remained in his custody until they were turned over to plaintiff company on January 9, 1933. He testified that he did not drain the radiators, and apparently took no steps to protect them.

The simple device of draining the radiators would have prevented the damage that was done.

The specifications required the plaintiff to execute a bond in the sum of $5,000 for the faithful performance of the contract, and required that it be approved by the Government. The bid, the letter of acceptance, and the specifications, which required the furnishing of an approved bond and set the time for completion of the work within 60 calendar days from the time of receipt of notice to proceed, constituted the contract. Plaintiff had no right to possession, control, or supervision of the property, nor any right to remove any part of it until the bond was approved and notice to proceed given.[1]

A reading of these instruments shows clearly that the property was in the complete custody and control of the Government until the bond was approved and notice to proceed given. It exercised full control and custody until all these essential steps were taken. Clearly it was obligated, under the terms of the contract, to take reasonable care of the premises, and to deliver the fixtures in substantially the same condition as

[1] *Thos. Earle & Sons* v. *The United States*, 90 C. Cls. 308.

they were at the time the bid was made. This it failed to do.

The plaintiff is entitled to recover the sum of $1,480.87. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge,* and WHALEY, *Chief Justice,* concur.

RUTHERFORD BYRNE JR. v. THE UNITED STATES

[No. 43781. Decided December 7, 1942]

On the Proofs

Disability annuity payments under Civil Service Retirement Act; discretion of administrative agency under the statute.—In order to set aside the decision of an administrative agency pursuant to the discretion conferred upon such agency by the statute, it would be necessary to find that the administrative officers who were authorized to determine questions of fact either exceeded their authority by making a determination which was arbitrary or capricious or unsupported by the evidence or failed to follow a procedure which satisfied elementary standards of fairness or reasonableness essential to the due conduct of the proceeding authorized by Congress.

Same.—The question of total disability in a given case is largely a question of fact; at the most it is a mixed question of fact and law. The question when total disability begins is a question of fact.

The Reporter's statement of the case:

Plaintiff entered Government service as a letter carrier on July 1, 1904, and as such remained on active duty through June 30, 1928; between July 1, 1928, and August 13, 1929, at different times, he was on annual leave and accumulated sick leave, and leave of absence without pay; and from August 14, 1929, to June 9, 1932, on leave of absence without pay; and on September 18, 1929, plaintiff filed an application for disability annuity payments under the provisions of the Civil Service Retirement Act of May 29, 1930 (46 Stat. 468); and after a medical examination by authorized physicians, said application was denied, and such decision on appeal was affirmed with right to reopen the case. Plaintiff on June 13, 1931, filed a new claim for retirement on account of disability, alleged to have commenced on July 20, 1928, and

upon a medical examination on July 14, 1931, was found to be not totally disabled, and said second application was denied. After a report from outside physicians, submitted on April 11, 1932, the claim was reopened April 23, 1932; an official examination was made on May 20, 1932, and the claim was allowed June 2, 1932, to be effective as of June 1, 1931, and on appeal such decision was on April 5, 1933, affirmed, and plaintiff has since been receiving disability payments dating from June 1, 1931. Plaintiff sues for disability annuity payments from July 1, 1928, to June 1, 1931.

Mr. Warren E. Miller for the plaintiff.

Mr. Joseph M. Friedman, with whom was *Mr. Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff entered the service of the Post Office Department of the United States on July 1, 1904, and remained on active duty as a letter carrier in Seattle, Washington, from that date through June 30, 1928.

2. Plaintiff performed no duties in connection with his employment after June 30, 1928. From July 1, 1928, to June 9, 1932, he was carried on the employment rolls of the Seattle Post Office in leave status as follows:

(a) July 1 to 19, 1928, annual leave (15 working days; with pay).

(b) July 20 to September 21, 1928, sick leave (accumulated; 54 working days; with pay).

(c) September 22, 1928, to July 15, 1929, absent, without pay.

(d) July 16 to 26, 1929, sick leave (10 working days; with pay).

(e) July 27 to August 13, 1929, annual leave (15 working days; with pay).

(f) August 14, 1929, to June 9, 1932, absent without pay.

3. On September 18, 1929, plaintiff, then 47 years of age, filed an application (executed by him on August 20, 1929) for retirement based on disability. The application was made under the terms of the Civil Service Retirement Act (specifically, section 6 of the Act of July 3, 1926, 44 Stat. 904, 907), pursuant to which retirement deductions had

theretofore been made from plaintiff's salary as an employee of the Post Office Department.

4. Plaintiff was examined on October 3, 1929, by a medical officer of the United States Veterans' Bureau, designated by the Commissioner of Pensions for that purpose, and found "not totally disabled for useful and efficient service as a city letter carrier." The examining physician's certificate concluded with a diagnosis of "hyperchlorhydria with functional gastritis, mild."

X-ray examinations of the gall bladder and gastrointestinal organs were included in the official examination, but no X-ray of the spine was made.

Plaintiff's original claim was based on a nervous breakdown, due to influenza and infected teeth and tonsils, but it made no reference to any trouble with his back. The official medical examination made in connection with that application gave a diagnosis of hyperchlorhydria with mild functional gastritis.

A neuro-psychiatric examination of plaintiff was made on October 5, 1929, by a neurologist to whom he was referred by the Veterans' Bureau medical officer. This examination was negative.

5. The Commissioner of Pensions denied plaintiff's application on October 22, 1929, and plaintiff appealed the decision to the Secretary of the Interior, who affirmed the action of the Commissioner of Pensions on December 5, 1929. A motion for reconsideration was overruled on January 27, 1930, and plaintiff was informed of the adverse decision by letter dated May 9, 1931, which further informed him that he was at liberty, if he cared to do so, to file any evidence he desired with a view to reopening the claim.

6. Instead of requesting that his original claim be reopened, plaintiff on June 13, 1931, filed a new application for retirement based on disability alleged to have commenced on July 20, 1928. In this application other disabilities were claimed, including encephalitis lethargica, neuritis, rheumatism, constipation, and secondary anemia. (The act of July 3, 1926, 44 Stat. 904, pursuant to which the original claim was filed, had been amended by the act of May 29, 1930, 46 Stat. 468.)

7. Official examination by the designated medical officer was made on July 14, 1931. The record of findings of the X-ray examination of the spine made on that date is as follows:

> There is wedging of the body of the 9th dorsal vertebra and some decrease in density. The intervertebral spaces are clear, the adjacent fracture narrowing the body to about two-thirds of its normal width.

No further medical report based upon this examination is in evidence. However, the decision of the Board of Veterans' Appeals showed that "all the evidence on file was fully considered, including the official examination made under date of July 14, 1931; the statement of the Assistant Superintendent of Mails dated July 1, 1931, and statements of Drs. Otteraaen, Bordsen, Schrag and Jergens, but it was held that this evidence was not sufficient to controvert the official examination."

8. The second application was denied on October 14, 1931, on the ground that the employee was not totally disabled for useful and efficient service. Appeal was taken, and the action affirmed on March 4, 1932.

9. In the early part of April 1932, plaintiff was examined by physicians who were members of the staff of an orthopedic clinic. The spinal X-ray examination made at that time "showed a definite destructive process affecting the dorsal spine and the character of the construction of the vertebra." The diagnosis was tuberculosis of the spine, and the examining physician was of the opinion that it was a "considerably advanced" condition, showing "a good deal of destruction of the body of the vertebra."

The orthopedic clinic made a report of its examination of plaintiff and submitted it to the Veterans' Administration. However, only that part of the report which refers to the spinal X-ray examination is in evidence.

10. On the basis of the orthopedic clinic's report, submitted April 11, 1932, plaintiff's claim was reopened on April 23, 1932. An official examination was made on May 20, 1932, which showed the following:

> Sthenic build, * * *. Carries body stiffly. Station and gait normal. * * * moderate kyphosis

without angulation in the region of the 8th and 9th dorsal vertebrae with complaint of tenderness on either side of spine in this area. Movements of dorsal spine accomplished with pain which is apparent from patient's expression, and back is held rigid as a protective measure. * * *

X-ray lower dorsal spine: * * * a destructive process involving the body of the 9th dorsal vertebra with compression of the body to about ⅓ of the normal width. * * * a fusiform shadow surrounding this * * * appearance would indicate a Pott's disease. * * * a slight involvement of the 10th dorsal vertebra * * * no gross compression of the body. Comparing the film of this date with films of July 14, 1931, there is a definite increase in the involvement of the body of the 9th dorsal vertebra and in the old films there is no evidence of involvement of the body of the 10th dorsal vertebra. The psoas abscess as observed in the recent film is much more pronounced than in the films of July 1931. From the X-ray alone there is evidently a definite and rather marked tuberculous process (active).

The claim was allowed on June 2, 1932, to commence from June 1, 1931.

11. Plaintiff appealed this action to the Administrator's Board of Appeals of the Veterans' Administration, because the date of commencement was not fixed prior to June 1, 1931.

The Board of Appeals made the review on the following questions at issue:

1. Has it been shown that the employee was disabled for useful and efficient service as early as August 14, 1929, when he claims his pay ceased?

2. Should his annuity, by reason of disability, be made to commence from that date?

The Board, after considering and reviewing all the evidence before it in connection with plaintiff's original application of September 18, 1929, and plaintiff's new application of June 13, 1931, found that:

The evidence filed since the last decision, considered in connection with the official examination made May 20, 1932, shows undoubtedly that the employee was totally disabled from the date of filing the last claim, June 13, 1931. It is not shown, however, by any evi-

dence that there was a total disability for useful and efficient service from the date of filing the original claim.

The allowance of the claim commencing on June 1, 1931, was accordingly affirmed on April 5, 1933.

12. In April 1932, following the examination at the orthopedic clinic, plaintiff was confined to bed, and remained so confined for a period of approximately five years.

During the last several months of his active service in employment, he complained repeatedly of physical distress, consulted a physician, received treatments, and became less and less active in his usual pursuits. These indications of illness continued in progression after plaintiff ceased active duty. He seldom drove his car, walked shorter distances and less frequently, and generally curtailed his customary activities.

In testifying at the time of the hearing before the Commissioner, the orthopedic surgeon, who had made the X-ray photographs in April 1932, interpreted the report of the medical officer's X-ray examination of July 14, 1931, to indicate tuberculosis of the spine "fairly well along" at that time, and stated that it had no doubt existed for many months. He then answered a series of hypothetical questions to the effect that, assuming that the symptoms of which he was informed the plaintiff had complained as early as 1928, existed, which symptoms he declared "go entirely with a general toxic reaction from a tuberculous lesion" and are "very typical" of such condition, a person so afflicted should not, and probably could not, work.

He had not made a personal examination until 1937, although he had made the X-rays in April 1932 for his partner, who had made an examination at that time.

The medical officer of the Veterans' Administration also testified, stating definitely that plaintiff's ailments prior to 1931 were not symptoms of spinal tuberculosis.

13. The evidence as to just when plaintiff became totally disabled for useful and efficient service as a letter carrier in the postal service by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part, is conflicting.

The Board of Appeals of the Veterans' Administration, after considering all the evidence submitted in support of the applications and the medical examinations made in connection therewith, found that plaintiff should be allowed a rating of total disability beginning June 1, 1931, and that the evidence did not show a total disability within the terms of the statute prior to that date.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

This is a suit for an amount which plaintiff alleges is due him as disability annuity payments for the period from July 1, 1928, to June 1, 1931, under the Civil Service Retirement Act of May 29, 1930, 46 Stat. 468, which provides for the making of such payments to certain Government employees in the event of their becoming totally disabled for useful and efficient service.

The Veterans' Administration[1] found that plaintiff became totally disabled as of June 1, 1931, for useful and efficient service as a letter carrier with the postal department. Since that time he has received annuity payments.

Plaintiff claims that he was totally disabled within the meaning of the statute from July 1, 1928, and that payments should have commenced as of that date.

Plaintiff entered Government service as a letter carrier at the Seattle, Washington, post office on July 1, 1904, and as such he remained on active duty there through June 30, 1928.

Between July 1, 1928, and August 13, 1929, he was on annual leave and accumulated sick leave with pay a portion of the time and on leave of absence without pay the re-

[1] Until 1930 the Retirement Act was administered by the Bureau of Pensions under the direction of the Secretary of the Interior. By Executive Order of July 21, 1930, pursuant to Section 1 of the act of July 3, 1930, 46 Stat. 1016, the functions of the Bureau of Pensions were transferred to the Veterans' Administration. By executive Orders No. 6670 and 6731, dated, respectively, April 7, 1934, and June 5, 1934, under Section 16 of act of March 3, 1933, 47 Stat. 1517, and Order of the Civil Service Commission dated August 24, 1934, the administration of the Civil Service Retirement Act was transferred from the Veterans' Administration to the Civil Service Commission, effective as of September 1, 1934.

maining part of that period; from August 14, 1929, to June 9, 1932, he was on leave of absence without pay.

On September 18, 1929, plaintiff filed an application for disability annuity payments on the ground that he was totally disabled for useful and efficient service as a letter carrier in the postal service. He ascribed his disability to a nervous breakdown due to influenza and infected teeth and tonsils.

On October 3, 1929, plaintiff was examined by a medical officer of the United States Veterans' Bureau designated by the Commissioner of Pensions for that purpose, and found "not totally disabled for useful and efficient service as a city letter carrier." The Commissioner of Pensions denied plaintiff's application on October 22, 1929. Plaintiff appealed to the Secretary of the Interior, who affirmed the action of the Commissioner of Pensions on December 5, 1929. A motion for reconsideration was overruled January 22, 1930. Plaintiff was advised of the decision by letter on May 19, 1931, in which he was informed that he was at liberty, if he cared to do so, to file any evidence he desired with a view to reopening the claim.

Instead of requesting that the original claim be reopened, plaintiff on June 13, 1931, filed a new claim for retirement based on disability alleged to have commenced on July 20, 1928, as the result of post-influenzal encephalitis lethargica, neuritis, rheumatism, constipation, and secondary anemia.

The designated medical officer examined plaintiff on July 14, 1931, and he was again found not totally disabled for useful and efficient service as a city letter carrier. Only a part of the medical officer's findings as a result of this examination are in evidence in the case. The following appeared from the report of the X-ray examination of the spine made on that date:

> There is wedging of the body on the 9th dorsal vertebra and some decrease in density. The intervertebral spaces are clear, the adjacent fracture narrowing the body to about two-thirds of its normal width.

The second application was denied on October 14, 1931. An appeal was taken and the decision affirmed on March 4, 1932.

In April 1932 the plaintiff was examined by physicians who were members of the staff of an orthopedic clinic in Seattle, Washington. They reported that the spinal X-ray examination made at that time showed "a definite destructive process affecting the dorsal spine and the character of the construction of the vertebra." The diagnosis was tuberculosis of the spine, and the examining physician was of the opinion that it was a considerably advanced condition.

This clinical report was submitted to the Veterans' Administration on April 11, 1932, and the claim was reopened April 23, 1932. An official examination was made on May 20, 1932, and the claim was allowed June 2, 1932, to be effective as of June 1, 1931.

Plaintiff appealed this action to the Board of Appeals of the Veterans' Administration because it had not fixed an earlier effective date for the finding of total disability.

The Board of Appeals after reviewing the evidence in both applications made the following finding:

> The evidence filed since the last decision, considered in connection with the official examination made May 20, 1932, shows undoubtedly that the employee was totally disabled from the date of filing the last claim, June 13, 1931. It is not shown, however, by any evidence that there was a total disability for useful and efficient service from the date of filing the original claim.

Since June 1, 1931, plaintiff has been receiving total disability annuity payments.

If this case were before us as a matter of first impression without any previous determination by the Board of Appeals or head of the administrative department, we might be inclined to fix the date of total disability somewhat earlier than it has been fixed by the administrative authorities. However, this is not the question with which we are faced. The wording of the statute and the various amendments thereto shows that the primary determination of the facts in respect to cases of this kind was placed in the hands of the administrative authorities, who were provided with

a staff including trained medical experts rather than being left to exercise the unaided judgment of laymen.

In 1920 the Congress provided a complete administrative plan for the retirement of Civil Service employees (41 Stat. 614). Included in this was a provision for annuity payments for disability. The act was amended from time to time, eligibility was determined, classes were fixed and deductions from salaries stipulated. Upon receipt of satisfactory evidence the Commissioner of Pensions was to adjudicate the claims of applicants, and if the right to an annuity were established, he was to issue a proper certificate.

The act provided that for the purpose of administration the Commissioner of Pensions was authorized and directed to perform or cause to be performed any and all acts and make such rules and regulations as might be necessary and proper for carrying the provisions of the act into full force and effect. Provision was made for an appeal to the Secretary of the Interior from the final action or order of the Commissioner of Pensions. The act provided for examination by physicians and surgeons to be designated by the Commissioner of Pensions in order that the applicant's disability, if any, might be determined.

Section 6 of the amendatory act of May 29, 1930 (46 Stat. 468, 473) provides that

> * * * No employee shall be retired under the provisions of this section unless examined by a medical officer of the United States, or a duly qualified physician or surgeon, or board of physicians or surgeons, designated by the Commissioner of Pensions for that purpose, and found to be disabled in the degree and in the manner specified herein.

The Congress provided for an administrative agency especially trained and equipped for handling these matters. It lodged the determination in the hands of the administrative officers. It made no specific provision for appeal to the courts.

The courts apparently have had some difficulty in determining whether under the terms of the act there is any

right of appeal by the applicant to the courts and if so what the extent of such jurisdiction is.

In the case of *United States* v. *Dismuke*, 76 F. (2d) 715, the Circuit Court of Appeals for the Fifth Circuit held that the retirement statutes made the decision of the administrative authority final and conclusive without any review whatever by the courts. In that case an applicant sought retirement annuity under the Civil Service Retirement Act based on a 30-year period of service. His claim had been rejected by the Veterans' Administration on the ground that his employment as a field deputy United States marshal, which applicant claimed as a part of his 30 years' service, could not be included because field deputy marshals at the time in question were employes of the marshal appointing them and not of the United States. There was no dispute as to the facts as they had been stipulated. Holding that the courts had no right of review in such a case the Circuit Court dismissed the case. Certiorari was granted and the Supreme Court, 297 U. S. 167, 173, while affirming the case on a somewhat different basis, discusses the question of the jurisdiction of the courts to review administrative determinations in cases of this kind. The Supreme Court said:

> The decisions of the Director of Insurance and the Board of Veterans' Appeals, and the stipulation of facts upon which the case was tried, show that the petitioner's claim for an annuity based on thirty years' service was rejected on the sole ground that his employment as a field deputy United States marshal could not be counted as service as an employee of the United States. The administrative decision thus turned upon a question of law, whether a field deputy marshal during the period from December 16, 1895 to December 30, 1902, was an employee of the United States. The administrative determination of that question is open to review in the present suit, and should have been considered and decided by the court below.

The court further says, at pages 171 and 172:

> The United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an ad-

ministrative remedy and make it exclusive, however mistaken its exercise. See *United States* v. *Babcock*, 250 U. S. 328. But, in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his. [Citing cases.] If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence [citing cases], or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized, *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 330, 331. * * *

The Commissioner is required by § 13, "upon receipt of satisfactory evidence" of the character specified, "to adjudicate the claim." This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it.

While some of the language quoted was probably meant by the court to be dicta, it was a very helpful discussion and serves to clarify the question presented in this case. It also holds specifically that the retirement act authorizes the commissioner "to adjudicate the claim" which had arisen under it. In order, therefore, to set aside the decision of the administrative agency pursuant to the discretion lodged in it, it would be necessary for us, in conformity with the restrictive limits set out in the *Dismuke* case, *supra*, to find either that the administrative officers who were authorized to determine questions of fact, exceeded their authority by making a determination which was arbitrary or capricious or unsupported by evidence, or that they failed to follow a procedure which satisfied elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized.[2]

[2] As to construction of similar statutes see *Silberschein* v. *United States*, 266 U. S. 221; *United States* v. *Williams*, 278 U. S. 255; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *Sprencel* v. *United States*, 47 F. (2d) 501.

In the disputed facts of this case we are not able to say that the action was arbitrary or capricious. We cannot say that it is unsupported by evidence. The medical testimony was in disagreement, and no one of the examining physicians undertook to fix the exact date when total disability commenced. We cannot, therefore, say that the decision which dated total disability one year earlier than the actual date of the determination was unsupported by evidence. Nor can we say that the procedure failed to satisfy elementary standards of fairness and reasonableness.

The basis of retirement for disability is set out in specific terms in section 6 of the act. The question of whether there is total disability in a given case is largely a question of fact. At the most it is a mixed question of law and fact. *Whitcomb* v. *White*, 214 U. S. 15; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106. The date when total disability began is a question of fact. *Sprencel* v. *United States*, *supra;* *Robinson* v. *United States*, 87 F. (2d) 343.

In the light of the decision referred to and for the reasons stated, the case should be dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

UNION ENGINEERING CO., LTD., v. THE UNITED STATES

[No. 43902. Decided December 7, 1942]

On the Proofs

Government contract; delay; waiver of liquidated damages.—Where plaintiff entered into a contract dated October 13, 1932, with the defendant under the terms of which, including the contract drawings and specifications constituting a part thereof, plaintiff agreed to excavate for and construct a post office building at Gallup, New Mexico, within a given time limit for a lump sum price; and where under the terms of the specifications said price was based upon excavation other than rock; and where the contract and specifications required plaintiff to excavate whatever material that should be encountered with provision for adjustment in price for rock, and plaintiff made

no preliminary investigation as to the presence of rock; and where rock was encountered in the progress of excavation, necessitating a change of method and equipment, all of which, as it was handled by plaintiff, resulted in delay; it is *held* that in the circumstances disclosed by the record the defendant did not bring about nor cause any unreasonable delay to plaintiff in connection with the rock excavation work and plaintiff is not entitled to recover damages for delay.

Same; action of defendant's representatives not unreasonable nor arbitrary.—Where, upon representations made by the plaintiff with respect to the increased cost of excavation by reason of the presence of rock, the supervising architect after proper investigation and report by the construction engineer, granted an extension of time and an increase in price, which was paid; it is *held* that the record does not disclose that the construction engineer acted unreasonably or arbitrarily in the circumstances.

Same.—Where plaintiff furnished the construction engineer with samples of aggregate which were approved; and where, thereafter, upon delivery shipments of aggregate upon examination and test were found not to conform to requirements of the specifications; and where upon protest modifications in the specifications were made by defendant's representatives and plaintiff was also granted an extension of time on account of the gravel controversy; it is *held* that the tests made were in accordance with the normal, accepted and proper method and the actions of defendant's representatives were not unreasonable nor arbitrary.

Same; liquidated damages.—Where upon proper report showing the balance due under the contract, including additions from time to time and extensions granted, and recommending that liquidated damages be waived, in accordance with the Act of June 6, 1902, such report was approved by the Secretary of the Treasury and liquidated damages were waived and the balance shown to be due was paid; it is *held* that the plaintiff is not entitled to recover damages for delay.

The Reporter's statement of the case:

Mr. Bernard J. Gallagher for plaintiff. *Mr. M. Walton Hendry* was on the brief.

Mr. D. B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Joe C. Stephens, Jr.*, was on the brief.

Plaintiff seeks to recover $7,290.11, made up of five items of alleged damages for delay totalling $7,007.41, and two items

for extra work of $84.70 and loss on extra work of $198, in the performance of a contract with defendant. Plaintiff insists that certain delays which occurred from time to time in connection with the performance of the contract work and the fulfillment of the contract requirements were caused by defendant and were unreasonable and that defendant is liable therefor under the contract, drawings, and specifications.

Defendant denies any liability for damages, loss, or extra work under the terms and conditions of the contract and insists that in the circumstances disclosed by the record it did not unreasonably delay plaintiff in the proper performance of the work called for by and in the fulfillment of the requirements of the contract.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a California corporation, entered into a contract dated October 13, 1932, with defendant under the terms of which, including the contract drawings and specifications constituting a part thereof, plaintiff agreed to excavate for and construct a post-office building at Gallup, New Mexico. The original lump-sum contract price agreed upon in connection with plaintiff's bid was $77,590. This amount as the contract price for all work required and embraced in the contract was, under paragraph 69 of the specifications, based upon excavation other than rock, and did not, for the reasons hereinafter set forth, include an additional amount necessary for the cost of any rock excavation to the depth of the excavation specified and called for, or for such foundation test pits and extra foundation material as might be found necessary below the specified excavation level and grade. The contract, the drawings, and the specifications did, however, call for and require plaintiff to do and perform all excavation necessary, whether in rock or otherwise, to the depth specified, and to make foundation test borings at certain designated points when that depth was reached.

2. The Secretary of the Treasury was the contracting officer. The contract was signed "By direction of the Secretary" by F. A. Birgfeld, Chief Clerk. Paragraph 29 of the contract specifications provided that "The decision of the con-

tracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final. The Supervising Architect is the duly authorized representative of the contracting officer."

3. Plaintiff, as well as other bidders, was furnished all drawings, specifications, and standard contract form upon the basis of and in accordance with which it submitted its bid and its offer to perform all of the work and to fulfill all of the requirements specified. The contract and specifications are in evidence as plaintiff's exhibit 2. The drawings are in evidence as defendant's exhibit A. These are made a part hereof by reference.

Drawing XI (first sheet of drawings furnished for bidding) and drawing 400 of the original drawings, and supplemental drawing 400A, are pertinent to some of the items of the claim.

4. The specifications and drawings were issued and bids were invited on July 27, 1932, to be opened by the Supervising Architect of the Treasury Department on August 24, 1932. An addendum to the specifications was issued and furnished to bidders on August 8, 1932. Special instructions furnished to bidders as a part of the invitation for bids stated in part that "Special care should be exercised in the preparation of bids. Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies."

As shown by the contract drawings, the site of the post-office building called for was on a corner vacant lot on First Street and Cole Avenue, 142 feet by 224.25 feet. The building to be constructed and for which excavation was required and specified was 58′ x 86′, basement and one story, with rear mailing vestibule and platform 22′ x 46′6″ basement and two story. The specifications provided that "The work to be done hereunder includes the furnishing of all labor and material and performing all work for the construction of building complete including mechanical equipment and approach work all as indicated on the drawings and as specified herein."

5. Paragraph 1 of the specifications set forth the contract drawings upon and in accordance with which the work would

be required to be performed. Paragraph 2 of the specifications set forth that "Drawing XI [first sheet of the drawings] relating to conditions of the site is not to become a contract drawing. It is furnished bidders only for such use as they may choose to make of it. The accuracy of data given on this drawing is not guaranteed. The structures indicated on drawing No. XI have been or will be removed to the general grade or yard level by others." Drawing No. 400, hereinafter referred to, showed the details of the foundations, footings, etc., and the depths to which excavations would be required therefor and for the basement of the building.

6. Ledge rock near the surface over a very large portion of the 142′ x 224.25′ site was visible from outcroppings. The area over which outcroppings of rock were not visible consisted of a triangle in the northwest corner of the site formed by a line drawn from a point about 75 feet east of the northwest corner of the site to the southwest corner thereof. Drawing XI showed the area of the site, with the exception of this triangle, to be rock. This drawing also showed the data resulting from two test pits and three borings made by the Government in this triangle. Test pit No. 1 was dug at a point 40 feet east of the northwest corner of the site and about 10 feet south of the north line of the site. This showed rock at a depth of 17 feet below the surface. Test pit No. 2 was dug at the south point of the triangle near the southwest corner of the site. This showed rock at 4 feet below the surface. A pipe driven at the northwest corner of the site showed rock at 17′2″ below surface. Two pipes driven near the west line of the site and near the center of the triangle showed rock at 3½′ and 6′, respectively. The post-office building faced west along First Street and a portion of the northwest corner of the excavation required for the foundations and basement of the building was within the triangle hereinabove mentioned. The balance of the excavation necessary and required under the contract was east of the triangle and in ledge rock.

7. Contract drawing No. 400 showing the details of the *foundation footings* and *foundation* walls showed the depths

to which excavations for foundations and basement were required to be made and stated as follows:

> COLUMN FOUNDATIONS. Figures given thus (8.22) are assumed elevations of the bottom of footings. The bottom of each footing shown on this plan shall rest upon hard rock at least three feet thick below the bottom of the footing and leveled to receive the footing.
>
> WALL FOUNDATIONS. Figures given thus (8.80) are assumed elevations of bottoms of walls. The bottom of the wall shall rest upon hard rock leveled to receive the wall, at least three feet thick below the bottom of the wall, except where a footing is indicated for the wall. In the latter case the figure given shall be the bottom of the footing. Where necessary to fulfill these requirements, walls shall be carried deeper than shown. Where sound rock of the required thickness is found above the elevations noted, the walls may be placed higher than indicated, provided that bottoms of walls other than area walls shall not be higher than (8.80); bottoms of area walls shall not be higher than (11.07).

This drawing also designated by appropriate indications the points at which borings must be made by the contractor for the purpose of determining the extent and thickness of rock, below the elevation of the excavation called for, as a foundation support. Paragraph 73 of the specifications provided that "When excavations for foundations have reached the required depth, borings shall be made where indicated on drawing No. 400. If it is found that the rock strata is less than 3′0″ in thickness below the required depth, the Supervising Architect shall be informed of same so provision for necessary footings may be made."

8. Paragraph 14 of the specifications provided as follows:

> *Visit to Site.*—Bidders should fully inform themselves of the location of the site and as to the conditions under which the work is to be done. Failure to take this precaution will not relieve the successful bidder from furnishing all material and labor necessary to complete the contract without additional cost to the Government.

The specifications further provided as follows:

> 67. All excavation shall be executed to given lines and levels, and also to provide for any additional working

space necessary for the placing, inspection and completion of all work embraced in the contract. Surplus and unsuitable excavated material for filling or grading shall be removed from the premises.

68. Any old foundation walls, floors or footings in place inside of a line drawn 2 feet outside of all new footings shall be entirely removed, except such portions as exist below the levels of new excavations and do not interfere with the proper installation of new work. Any other walls, curbs, paving, etc., in place inside the lot lines shall be removed to a depth of 2 feet below the finished grade, unless indicated on the drawings to remain.

69. The basis of bidding shall be such that all other material to be removed is of such kind that it will be practicable to remove and handle it with pick and shovel or by hand or to loosen and remove it with a power shovel.

70. If excavation of still other materials becomes necessary the additional expense will be determined by the Contracting Officer.

71. Work not covered by the contract shall not be done until authorized in the manner provided in the contract.

The excavation of the rock which was visible on the site and shown and described in the drawings was work embraced in the contract and required of plaintiff under the contract. Only the matter of the additional expense of such rock excavation, in addition to the bid price as called for by paragraph 69 above, was left for future determination by the contracting officer as provided in paragraph 70, *supra*.

9. Article 3 of the contract was the usual provision of the standard form of Government contract giving the contracting officer the right to "make changes in the drawings and specifications and within the general scope thereof," and requiring the contracting officer, "if such changes cause an increase or decrease in the amount due under this contract" to make "an equitable adjustment." Paragraphs 69, 70, and 71 of the specifications, *supra*, contemplated and intended that such additional amount for rock excavation shown and required as should be added to the contract price agreed upon in the manner stated in paragraph 69 would be taken care of by an equitable adjustment increasing the contract price as provided in Article 3. The contracting officer so held. The

excavation of rock for the basement and foundations of the building to the depths called for and shown on the contract drawings was not a changed, unknown, or subsurface or latent condition under Article 4, materially differing from the conditions shown, indicated and known at the time bids were called for and submitted. The additional excavation work and material, hereinafter mentioned, which it was found necessary for plaintiff to perform and furnish to meet and overcome conditions encountered at the excavation depths called for on drawing No. 400 were the result of unknown subsurface and latent conditions within Article 4 of the contract.

10. Paragraph 7 of the specifications fixed a period of 360 calendar days for completion of the contract from the date of receipt of notice to proceed, and paragraph 8 provided for liquidated damages in favor of the Government at the rate of $35 a day for delay in the completion of the contract.

11. Plaintiff submitted its bid August 22, 1932, without having visited the site of the work and without having had any examination made thereof. The Secretary of the Treasury by letter of October 13, 1932, signed by the Chief Clerk, "By direction of the Secretary," advised plaintiff that its bid of $77,590 for the construction of the building of brick was accepted, and directed plaintiff to execute the formal contract and furnish performance bond. The contract, dated October 13, 1932, was executed by plaintiff and forwarded to defendant. It was executed by defendant on or about October 28, 1932, and on that date plaintiff received written notice to proceed with the work called for and required by the contract, drawings, and specifications. Article 1 of the contract provided that "The work shall be commenced as soon as practicable after the date of receipt of notice to proceed." The site of the work was clear and ready for plaintiff to proceed with its work when the notice to proceed was given.

12. Plaintiff's president, J. K. Thomas, and Superintendent Harper arrived at the site of the work November 9, 1932. Louis R. Smith was designated as defendant's construction engineer at Gallup, New Mexico, to have immediate charge under direction of the Supervising Architect of the per-

formance of the contract with plaintiff. Smith was notified on November 2, 1932, at which time he was construction engineer at New York City, to leave New York November 11 and go to New Mexico as construction engineer of the work there. Smith left Washington the evening of November 11 and arrived on the site of the work at Gallup November 15.

Plaintiff's office and headquarters were at Huntington Park, California. Plaintiff's president returned to California from Gallup before defendant's construction engineer arrived. November 14 plaintiff's superintendent began laying out lines and elevations. Upon arrival at the site plaintiff observed that at least ninety percent of the excavation called for and required by the contract would be hard ledge rock. Plaintiff had provided no equipment nor made arrangement for any equipment for the necessary excavation work. Plaintiff had made no decision as to the method it would employ in removing the rock.

13. Plaintiff's president, Thomas, returned to Gallup November 18, 1932, and discussed with defendant's construction engineer, Smith, the matter of the rock excavation and the additional amount to be paid therefor to be added to the contract price as contemplated by paragraphs 67, 69, and 70 of the specifications. Smith told plaintiff that upon receipt of its estimate and proposal as to the additional amount to be added to the contract price of $77,590 on account of excavating the rock to the levels or elevations specified in and called for by the contract, he would examine and investigate the same and submit a report and recommendation thereon to the Supervising Architect, as soon as the earth portion of the excavation called for had reached the point where the approximate amount of rock excavation could be fairly ascertained. On November 21, 1932, plaintiff's work of removing the earth overlaying the rock over the area to be excavated for the building was begun. The removal of this dirt material was completed in three days. Plaintiff did no further work until January 30, 1933, when it commenced excavating the rock, which it completed on March 8, 1933. There was no reason why plaintiff should not have known by the time it received notice to proceed on October 28 what method and

equipment should be used to excavate the rock and the fair additional price per cubic yard which it considered should be paid it on account thereof. Plaintiff knew when it submitted its bid and at all times thereafter that it would have to excavate the rock and that such excavation was embraced within the work called for and required by the contract, though, as provided in paragraph 69 of the specifications, the additional allowance to be made therefor was to be left for later determination. Plaintiff had had no experience in rock excavation. This was plaintiff's first contract with the Government.

14. November 22, 1932, construction engineer Smith wrote the Supervising Architect that as soon as he had received plaintiff's estimate and proposal as to the additional amount which it considered should be allowed for excavating the rock and as soon as the excavation of the material over the rock had reached the point where the approximate amount of rock over the area to be excavated could be fairly ascertained he would transmit plaintiff's proposal (which had not then been submitted) with his findings and recommendations. There was no reason, and none appears from the proof, why plaintiff should not have been fully prepared not later than November 15, 1932, to proceed with the required excavation and to submit its estimate and proposal as to the additional amount to be paid on account thereof. If plaintiff had acted properly and diligently in this matter, excavation work could easily have been commenced not later than November 15, 1932, and the entire excavation work completed on or before December 26, 1932, seventy-three days earlier than it was completed on March 8, 1933. In the circumstances disclosed by the record the defendant did not bring about or cause any unreasonable delay to plaintiff in connection with the rock excavation work.

15. December 5, 1932, plaintiff submitted to the construction engineer its first proposal of the amount of $4,411.50 by which the total of the contract price should be increased for excavating rock with an extension of time of 45 days. This proposal was at the rate of $2.25 per cubic yard for an estimated yardage of 1,974 cubic yards. In a letter of the same date construction engineer Smith approved and recom-

mended acceptance of plaintiff's proposal by the Supervising Architect as fair and reasonable to both parties. However, before it was accepted by the Supervising Architect, plaintiff on December 9, 1932, wired him withdrawing the offer of $2.25 per cubic yard and submitting a new one at the rate of $3.25 per cubic yard. The reason given by plaintiff was that the first proposal contemplated blasting and it was unable to obtain property damage and workmen's compensation insurance for blasting operations and that the rock excavation would have to be performed by hand by use of air drills and jackhammers. December 12 the construction engineer wired the Supervising Architect that in his opinion the rate of $3.25 was too high. The architect requested plaintiff to submit a lump-sum proposal, which plaintiff did on December 22, in the amount of $6,400, which was based upon $3.25 per cubic yard, and for which it gave as the reason "positively cannot blast and must ship in and out proper air equipment to perform work." The architect after proper investigation and report of the construction engineer considered the second and third proposals excessive and advised plaintiff January 12, 1933, that cost plus 10% for overhead plus 10% on cost and overhead for profit not to exceed a total of $6,400 would be allowed for excavating the rock as the addition to the contract price, as contemplated by paragraph 70 of the specifications and article 3 of the contract. An extension of time of 45 days was allowed. There was some controversy and negotiation between the defendant's construction engineer and plaintiff as to the propriety of certain of the expenses which plaintiff proposed to incur and claim on the cost-plus basis, but the evidence of record does not establish that the construction engineer acted unreasonably or arbitrarily in the circumstances.

Plaintiff attempted to commence rock excavation January 27, 1933, but could not get his air compressor in operation. Work of attempting to excavate the rock by air-operated drills and jackhammers was commenced on Monday, January 30, 1933, and proceeded in that manner until about February 1, when plaintiff found and decided that it could not excavate the rock in this manner and by this method.

The rock was very hard and in addition it was frozen. Plaintiff requested of the Supervising Architect permission to use a small amount of dynamite to blast the rock. The Architect advised plaintiff February 4, 1933, "No objection use small amount dynamite site Gallup at your own risk * * * subject satisfactory arrangement construction engineer Smith." Plaintiff proceeded to use a large amount of dynamite over the protest of the construction engineer. Plaintiff used from three to six sticks of 40 percent dynamite per hole and at times blasted as many as six holes at one time. Practically all of the rock excavation was done by blasting operations, rather than with air equipment.

16. The excavation work to the elevations called for and specified on contract drawing No. 400 was completed on March 8, 1933. March 20 plaintiff submitted a bill for $5,990.83 as the amount to be added to the price on a cost-plus basis. April 28 plaintiff submitted a revised bill for $6,330.30. The construction engineer raised some objections to the amounts of these bills for claimed cost-plus overhead. Thereafter plaintiff revised its bill to $5,451.89, which was approved and paid. At plaintiff's request an additional 35 days' extension of time was allowed on account of the rock-excavation work.

With the exception of 3 days employed in removing the soil from over the ledge rock on the site, plaintiff did no work in the performance of the contract between November 9, 1932, when it arrived on the site, and January 30, 1933. This delay was not caused by acts of the defendant, and defendant was not responsible therefor.

17. Between March 1 and 4, 1933, plaintiff excavated certain test holes below the specified foundation elevations as called for by paragraph 73 of the specifications and drawing No. 400 (see finding 7), and this work was about completed on the last-mentioned date. It was necessary for Smith to leave Gallup March 4 for a few days, and he submitted to the Architect a report on that date of his findings. E. C. Elliott, a construction engineer employed by defendant on another project at Albuquerque, New Mexico, went to Gallup and on March 15 submitted a report and recommended that certain

extra work of extending the foundations be authorized. March 17 the contracting officer through the Supervising Architect advised construction engineer Smith, who had returned, that as the funds available for the Gallup post-office building were very low, this extra work of extending the foundations could not be authorized until plaintiff had submitted its bill for the rock excavation, completed on March 8, as hereinbefore mentioned. Plaintiff was requested to submit a proposal of its price for the extra work and material necessary to extend the footings and foundation below the levels shown on drawing 400 shown to be necessary by the test pits excavated. Revised drawing No. 400A was prepared and approved by the Architect about March 16, 1933, and furnished to plaintiff. This drawing showed that additional work and materials would be required and also the reduction in certain work and materials called for by original drawing 400. March 31, 1933, plaintiff submitted a proposal of $1,543.86 for the extra footing work and material, plus $15 a day after April 10, 1933, if notice to proceed was not given on or before that date. Plaintiff proposed a reduction of $81.31 in the contract price by reason of eliminations. The final result of the foundation test pit at the northwest corner of the excavation for the building had not as yet been determined. The construction engineer made certain objections to plaintiff with reference to a number of cost items of plaintiff's proposal of March 31, which the engineer considered to be either improper or excessive. April 7, 1933, plaintiff submitted a revised proposal of $988.18 for the extra work and material necessary to extend the footings and foundations on the basis of the information disclosed by the test pits up to that time, with a reduction of $83.51 for eliminations. April 11 the construction engineer, after investigation of the amount and cost of work and material which he considered necessary, made itemized findings showing a total of $745.01, including overhead and profit, which he reported with his recommendation to the Supervising Architect. On the same day the construction engineer wrote the Architect setting forth certain well founded objections to certain items of plaintiff's April 7 proposal. After consideration of plaintiff's proposals and the construction engineer's findings and

recommendations thereon, the Supervising Architect on May 3, 1933, wired the construction engineer to advise whether he considered "subsurface information sufficiently accurate and complete so that no further expenditure will be necessary account unexpected variations in rock surface and soil condition." May 4 the construction engineer reported that subsurface information was sufficiently accurate and complete to secure bearings required for all footings except at northwest corner and asked for authority to further excavate the test hole at that point to eliminate this uncertainty. This was done, beginning May 4, at Government expense of $29. As a result satisfactory bearing was found, and thereupon plaintiff was asked to submit its proposal for the extra footing work in the light of the facts disclosed by the additional excavation at the northwest test pit. Plaintiff did so on May 17 and requested 70 days' extension of time in connection therewith. After consideration and negotiation between the construction engineer and plaintiff the net figure of $1,000, including overhead and profit, was arrived at as the amount to be allowed and paid for the necessary extra foundation work and materials. May 17 the construction engineer recommended that plaintiff's proposal of $1,000 with extension of time be accepted. May 22, 1933, the contracting officer approved the same and wired the parties accordingly.

18. Plaintiff's operations thereafter continued without interruption until June 22, 1933, when the third carload of concrete aggregate shipped by plaintiff to the site of the work was rejected by the construction engineer because the aggregate was very dirty and did not otherwise comply with paragraph 98 of the specifications and the sample originally submitted to and approved by the construction engineer December 13, 1932, under paragraph 65.

Neither the construction engineer nor the contracting officer through the Supervising Architect acted unreasonably or arbitrarily in connection with any matter concerning the extended footings and foundation work. They did not under the circumstances delay unreasonably in giving necessary and proper consideration of and acting with reference to the necessary additional foundation work, nor did they or either of them delay unreasonably in connection with the necessary

and proper consideration and action upon plaintiff's proposals as to the price to be paid for such work, before authorizing and ordering such work and the furnishing of the materials necessary therefor.

19. Whatever delay resulted in the performance and completion of the contract by plaintiff, including rock excavation and extended footings, beyond reasonable extensions for these two items, was brought about and caused primarily by failure of plaintiff promptly to submit proper and reasonable proposals as to the amount for which the work involved could and would be performed. The construction engineer in the proper performance of his duties considered it necessary, and in this he was clearly justified, to make a careful study and investigation of each of plaintiff's proposals. Article 3 of the contract provided for reasonable changes in the drawings and specifications of the contract and within the general scope thereof, and for an equitable adjustment in the contract price for the increase or decrease in cost resulting therefrom. Article 4 required an investigation by the contracting officer of any changed, subsurface, or latent conditions discovered and a written order with reference thereto with an equitable adjustment in the contract price by reason of any extra work or materials or decrease in work or materials found necessary.

Article 5 provided that "Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

The Regulations of the Treasury Department issued by the Secretary of the Treasury governing construction projects under the supervision of the Supervising Architect as the authorized representative of the Secretary provided in paragraph 102 that "construction engineers are expected to supervise the construction and secure the completion of the projects under their charge in accordance with the contract requirements and within the contract time, through their own initiative, and without unnecessary correspondence with the OFFICE." Paragraph 512 of these regulations provided that "When conditions arise which necessitate a change in a building, the construction engineer should obtain from the contractor a proposal, in duplicate, for the work involved and

forward it to the OFFICE with his definite recommendation and itemized estimate."

20. Paragraph 53 of the specifications required the contractor to furnish samples of certain materials called for by the contract and which it intended to use in the performance of the contract. Paragraph 65 required plaintiff to furnish samples of each kind of concrete aggregate to the construction engineer. Paragraph 98 of the specifications provided as follows:

> AGGREGATE shall be clean, hard gravel, broken stone that will be retained on a ¼-inch screen and shall be well graded in size from fine to coarse. Sizes specified for aggregate are the maximum acceptable and represent standard screen sizes.

Plaintiff furnished the construction engineer samples of aggregate from the Springer Transfer Company, of Albuquerque, New Mexico, from which plaintiff had arranged to secure its aggregate, and these samples, after examination and proper test, were accepted and approved December 14, 1932. The first car of plaintiff's concrete gravel arrived April 22, 1933, and after examination and test was accepted by the construction engineer. The second car of aggregate arrived June 6, 1933, and after examination and test the construction engineer found that it contained too large a quantity of "fines" (fine gravel) and otherwise did not meet the specifications as to size. Accordingly he ordered plaintiff to rescreen this aggregate, which was done, and the rescreened aggregate was approved after removal of 13½ cubic yards of unsatisfactory material out of the carload total of 40 cubic yards. The third car of aggregate arrived June 22, 1933, and proper samples were taken, examined, and properly tested by the construction engineer. This carload of aggregate was very dirty; that is, it contained throughout a large amount of sand, loam, and other objectionable material and did not otherwise measure up to the samples or reasonably conform to the requirements of paragraph 98. The construction engineer properly rejected this car of aggregate, after he had allowed a reasonable tolerance of 3 percent. This carload of aggregate failed to meet the specifications by 10 to 25 percent over the allowable tolerance of 3 percent.

Plaintiff and the Springer Transfer Company insisted that the gravel should be approved and accepted. The transfer company indicated that it could not or would not furnish gravel any different from this third carload.

July 1, 1933, sometime after the third car of aggregate had been rejected, construction engineer Smith made a full report of his examinations, tests, and findings in connection with the three cars of aggregate shipped to the site and of his reasons for rejecting the third car. Plaintiff protested the action of the construction engineer to the contracting officer, and plaintiff and the Springer Transfer Company also protested to J. C. Elliott, a construction engineer for defendant in the construction of a post-office building at Albuquerque, New Mexico. The contracting officer did not overrule construction engineer Smith's findings or ruling in rejecting the third carload of aggregate. July 13 the Supervising Architect instructed engineer Elliott to investigate and report on the aggregate situation at Gallup and the quarry at Albuquerque. July 28, Elliott recommended that in view of the acute situation and delay, authority be given to use 1¼″ aggregate in concrete walls and ¾″ aggregate in concrete floors. The use of such aggregate required a modification of the specifications, and this was approved by the Supervising Architect.

On August 12, 1933, another car of aggregate arrived at Gallup and after inspection and test was rejected by construction engineer Smith because it did not come within or conform to the specification as changed. This finding and decision of Smith was correct, and it was not overruled by the Supervising Architect.

In making his tests to determine whether or not the aggregate reasonably met the requirements of the specifications, engineer Smith in each instance used the normal, accepted, and proper method. Plaintiff was given an extension of 10 days in the contract time on account of the gravel controversy. Such delay as may have occurred in the completion of the contract by plaintiff by reason of the failure of plaintiff to supply proper concrete aggregate was not caused by defendant.

21. By reason of the problems which had arisen in connection with plaintiff's work and attitude, with which construc-

tion engineer Smith had had to deal up to this time, and in the hope that a change in construction engineers would result in improvement in plaintiff's attitude and cause plaintiff to speed up the work, the Supervising Architect sent construction engineer Elliott to Gallup August 18, 1933, and transferred engineer Smith to another post. This transfer was not made because of any unauthorized, arbitrary, or improper conduct, acts, or rulings of construction engineer Smith. He was an able and conscientious construction engineer.

22. The contract provided for chamfer corners at the external angles of the building and at the corner of the chimney below an ornamental-belt course. Prior to the making of bids an addendum to the specifications was issued providing for the use of brick in lieu of concrete above the water-table course. Certain provisions of this addendum were as follows:

> PAR. 6.—Above the water table the exterior walls, including interior partitions of mailing vestibule and chimney, shall be brick in lieu of concrete, except that the concrete lintel for opening No. 21 shall be full thickness of wall with exterior bases exposed.
>
> PAR. 9.—The ornamental belt below top of chimney shall be built up of bricks; above this belt the chimney shall remain as shown.
>
> PAR. 30.—Special shaped face brick shall be provided for exterior angles other than 90 degrees.

This chamfer work cost plaintiff $84.70. Plaintiff insisted at the time the work was being done that this was extra work not required by the contract and asked for an extra-work order and also made claim therefor as an extra cost. The construction engineer and the contracting officer held that the chamfer work required to be performed was work called for by the specifications and denied plaintiff's request for an extra-work order and also denied its claim for payment of the cost thereof as an extra. These decisions were correct.

23. Paragraph 32 of the specifications provided that "The contractor shall provide temporary heat as necessary to protect all work and materials against injury from dampness and cold, to the satisfaction of the Construction Engineer." Plaintiff spent $635.72 for necessary temporary heating during the winter of 1933–34 and made claim therefor on the

ground that the contract price did not include temporary heat during the winter months of 1933–34 and that this expense was made necessary by reason of delays caused by the Government and for which delays the Government was responsible. The construction engineer and the contracting officer, who was also the head of the department, denied the claim. These decisions were correct.

24. If plaintiff had been properly experienced in the performance of work as called for and required by this contract, drawings, and specifications; if its responsible officers had acted when it made its bid and after its bid was accepted October 13, 1932, and thereafter, with reasonable prudence, foresight, and promptness; if it had determined when it made its bid or when its bid was accepted what equipment would be needed and required to best perform the work embraced in the contract and in the most expeditious manner, and which work plaintiff knew, or should have known, it would have to perform; if plaintiff, after it did examine the site in November 1932, had known what equipment should be used and had provided the same; if plaintiff had been able to prepare and submit fair and reasonable estimates and proposals as contemplated by the contract which would not have required so much time and effort in connection with the investigation and consideration necessary to action thereon; if plaintiff had supplied proper concrete aggregate, and if it had properly handled and superintended its laborers on the job during the performance of the contract, the work embraced in and called for by the contract, including the rock excavation and the extended and additional footing and foundation work, all could have been completed within the original contract period of 360 calendar days, or a reasonable time thereafter. The contracting officer gave plaintiff liberal extensions of time. Plaintiff timely protested to the Supervising Architect throughout the time that it was engaged in the performance of the contract that the construction engineer and the Supervising Architect were delaying the performance of the work.

25. Under an act of Congress and an Executive Order of the President the Director of the Procurement Division of the Treasury Department became in 1934 the successor of

the Supervising Architect and became the authorized representative of the Secretary of the Treasury as contracting officer.

Plaintiff completed the contract and the building was accepted June 1, 1934, 221 days after October 23, 1933, the end of the 360 days (after notice to proceed) originally fixed by the contract. Plaintiff requested extensions of time.

26. After completion of the contract plaintiff made claim to the contracting officer October 4, 1934, for a total additional payment of $25,655.16, made up of (1) $12,560.07 for alleged unnecessary expenses because of delay and inefficiency of labor during winter weather and for alleged extra work, and (2) $13,095.09 alleged loss on the job including anticipated profits.

The contracting officer considered and denied all of the items of this claim and advised the plaintiff thereof February 28, 1935. None of the items claimed were allowable under the facts, circumstances, and the contract provisions, and the decision of disallowance was correct.

27. March 28, 1935, the Director of Procurement made the following report and recommendation to the Secretary of the Treasury:

> The following report and recommendation are submitted relative to contract #T1 SA-3600, with the Union Engineering Co., Ltd., Huntington Park, California, for construction of the Post Office building at Gallup, New Mexico:

Date of contract	Oct. 13, 1932
Time for completion fixed in contract (360 days from 10/28/32)	Oct. 23, 1933
Time for completion as extended under Art. 3 in connection with changes (184 days)	Apr. 25, 1934
Liquidated damages for delay	$35.00 per day
Amount of contract as originally awarded	$77,590.00
Additions from time to time	7,787.90
	$85,377.90
Deduction—6/29/34	36.01
	$85,341.89
Less payments on account	82,550.05
Balance	$2,791.84

> The following delays, reported by the contractors, have been established as correct by investigation of this Divi-

sion and are of a character excusable under Article 9 of the contract:

Sept. 1, 1934—Awaiting decision relative to lobby beams and stain for wood finish	30 days
Sept. 1, 1934—Approval of gravel	10 days
Total	40 days

The time for completion without penalty, therefore, became June 4, 1934.

A review of the records relative to the contract indicates that the building was ready for occupancy and the work completed by June 1, 1934, with the exception of certain defects and omissions. These items were not of a character to interfere with the transaction of Government business, and were all corrected or supplied by June 29, 1934, except for one minor adjustment, which was completed by July 27, 1934, without loss or inconvenience to the Government due to the delay.

In view of the above, it is recommended that liquidated damages be waived, in accordance with the Act of June 6, 1902, and authority given for the payment of the balance due, viz, $2,791.84, from the appropriation, "Post Office, Gallup, New Mexico."

The Secretary of the Treasury approved this report and recommendation with the signed indorsement "Approved, damages waived and payment authorized."

Section 21 of the act of June 6, 1902 (32 Stat. 310, 326) provided as follows:

> That in all contracts entered into with the United States, after the date of the approval of this Act, for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is hereby authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.

27. During the period of performance of this contract the salary of plaintiff's superintendent was $50 a week, except

during the period January 30 to March 8, 1933, when he received $75 a week. Plaintiff did not pay its laborers when they were not actually at work on the job. Plaintiff had only one other contract during the period of performance of the contract in suit. Plaintiff's president received a salary of $200 a month. Plaintiff's reasonable overhead expense applicable to this contract, exclusive of superintendent's salary, but including salaries of its president and a Washington representative, was not in excess of $7 a day. In connection with its regular business activities plaintiff employed a Washington representative to whom it paid, during the period of this contract, a salary of $50 a month. Plaintiff's expense for superintendent's salary and overhead attributable to the contract here involved was $14.15 a day.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover a total of $7,290.11 as damages, representing, for the most part, alleged expense and overhead for delays during the performance of the contract, which delays are claimed by plaintiff to have been brought about and caused by the defendant, and for which it is alleged the defendant should respond in damages. The amount of $84.70 of the claim represents the cost of alleged extra work for grinding certain bricks to make beveled corners at certain places in the building, and $198 is for alleged loss on extra footing and foundation work.

Plaintiff's claim for damages for delay is based upon (1) the superintendent's salary of $50 a week, or $7.15 a day; (2) alleged overhead expense of $88.43 a month, or $2.95 per day, plus $150 a month, or $5 a day on account of the president's salary of $200 a month; (3) expense of $294 for three round trips of plaintiff's president to Gallup between October 28, 1932, and January 30, 1933, and $38 for one trip to Albuquerque July 19, 1933; (4) one half, or $25 a month (83⅓ cents a day) of salary of a Washington representative; (5) loss of $198 on proposal for extra foundation footing work; (6) temporary heating expense of $635.72; and

(7) 20% inefficiency of labor due to cold weather, amounting to $1,594.29.

On this basis plaintiff claims damages of $1,791.73 for 94 days' delay (including three trips to Gallup from California) between October 28, 1932, and January 30, 1933. It claims $1,850.07 for 104 days' delay (including $198 alleged loss on footings) during the period March 8 to July 5, 1933. It claims $1,328.60 (including the trip to Albuquerque) for delay of 81 days between May 23 and August 12, 1933. These amounts, plus the alleged loss of $1,594.29 for alleged inefficiency of labor and $635.72 for temporary heat during the winter of 1933–34, and alleged extra work of $84.70 hereinbefore mentioned, make the total sum claimed of $7,290.11.

With the exception of the items of $84.70 for alleged extra work, and $198 alleged loss on extra footing work, the question of whether plaintiff is entitled to recover all or a part of what it claims is one of fact—namely, did the defendant unreasonably delay plaintiff in the proper performance of the work in such a way and under such circumstances as to render it liable to plaintiff for damages on account thereof? We are of opinion that it did not. The record in all of its phases has been carefully studied, and the evidence as a whole shows that the delays, to the extent to which they might be considered in any way unreasonable, were brought about and caused by the plaintiff.

The essential facts as established by the record are set forth in the findings, and no useful purpose would be served by a discussion of them here. Neither the construction engineer nor the contracting officer acted unreasonably or arbitrarily. The contracting officer was liberal in his allowances of extensions of time to plaintiff and, in the exercise of his discretion under section 21 of the act of June 6, 1902, *supra*, in waiving liquidated damages. Plaintiff's claims for damages for delay are therefore denied.

The work, for which plaintiff claims $84.70 as an extra, of grinding brick to provide chamfers or beveled corners, was called for and required by the contract. The original specifications which contemplated concrete walls called for certain beveled corners, as did the addendum calling for a bid for brick walls. The contract price of $77,590 as agreed upon

and the contract as made called for brick walls. The decisions of the construction engineer and the contracting officer that this was not extra work under the contract were correct under paragraph 29 of the specifications and Article 15 of the contract.

The alleged loss of $198 for the extra footing work and materal cannot be allowed. The amount of $1,000 to be allowed and paid for this work was agreed upon by the parties and was allowed and paid in the change order under and in accordance with Articles 4 and 5 of the contract.

Plaintiff is not entitled to recover, and the petition is dismissed. It is so ordered.

Madden, *Judge;* Jones, *Judge;* Whitaker, *Judge;* and Whaley, *Chief Justice*, concur.

J. B. LAKE, JR. v. THE UNITED STATES

[No. 43912. Decided December 7, 1942]

On the Proofs

Pay and allowances; bachelor officer in Marine Corps without dependents.—Where plaintiff, a bachelor officer in the Marine Corps, without dependents, while on active duty in China, was not assigned quarters and from April 8, 1932, to September 14, 1932, occupied a room for which he paid the rent; it is *held* that plaintiff is entitled to recover under the act of May 31, 1924 (43 Stat. 250).

Same; quarters not "assigned"; act of May 31, 1924.—Under the 1924 Act in order to establish his right to a money allowance for quarters an officer must show only that he had not been "assigned" the number of rooms to which his rank entitled him; it is not necessary to show that no rooms were available for assignment. *Cornell* v. *United States*, 93 C. Cls. 314, 315, distinguished.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiff. *Mr. John W. Price* was on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. From February 4, 1932, to September 14, 1932, both dates included, plaintiff was a second lieutenant, United States Marine Corps, a bachelor without dependents, and served with the Marine Corps Expeditionary Forces in China.

2. For about two months of plaintiff's initial service during that period in China he occupied unassigned quarters above the Officers' Club in a brick building on Seymour Road in Shanghai. Two floors of this building were rented by the Government for the use of officers assigned to duty in Shanghai. In the space so rented plaintiff, for a part of this period, was permitted to and did occupy alone a small single room, and for the remainder he shared a larger room with another officer. He was furnished with an iron cot and chair and also had the use of a bathroom, which was shared by the other officers, except one who had a suite.

3. On arrival in China, plaintiff made no application for assignment of quarters, but about six weeks thereafter he was informed that he had been assigned quarters above the Officers' Club in the building on Seymour Road.

4. After occupying Government quarters for approximately two months plaintiff voluntarily moved out and occupied one large furnished room and bath, which he rented at his own expense in the Young Men's Christian Association at a rate in excess of his rental allowance.

5. The amount of full rental allowances authorized for an officer of plaintiff's status from February 4, 1932 to September 14, 1932, both dates included, is $284.80, which has not been paid to plaintiff. From April 8, 1932, six years prior to the date of the filing of the petition, to and including September 14, 1932, plaintiff's full rental allowance is $199.47. The value of the room furnished by the defendant and occupied by the plaintiff during the first two months he was in China was $25.00.

The court decided that the plaintiff was entitled to recover.

Whitaker, *Judge*, delivered the opinion of the court:

The plaintiff claims rental allowance from February 3, 1932, to September 18, 1932, during which time he was on

duty in China. No quarters were assigned to him, but for about two months after he first arrived he was permitted to occupy, first, a small single room, and, later, a larger room in company with another officer. After about two months he moved out of these quarters of his own volition and secured a room with bath at the Young Men's Christian Association, which he occupied for the remainder of his stay in China. He sues for rental allowance both while occupying Government quarters and after he had moved out.

Under numerous decisions of this court there must be deducted from his rental allowance the value of the Government quarters occupied by him; *Francis* v. *United States*, 89 C. Cls. 78; and this is so, even though he shared his room with another; *Hartsel* v. *United States*, 92 C. Cls. 127. The defendant says there should be deducted also the value of these quarters even after plaintiff vacated them.

In *Cornell* v. *United States*, 93 C. Cls. 314, 315, it was held in a *per curiam* opinion that plaintiff was not entitled to recover his full rental allowance where he had occupied Government quarters and then vacated them; but that he was entitled to recover only the difference between the rental allowance and the value of the quarters "made available by the Government." That case, however, is not authority here because there is no showing here that the room remained available to plaintiff after he vacated it. After he vacated it, for aught that appears, it may have been assigned to another officer, leaving none available to the plaintiff.

Under the 1924 Act (43 Stat. 250) a plaintiff must show only that no quarters were assigned to him; if not, he is entitled as of right to the money allowance. Section 6 of that Act reads in part:

> Except as otherwise provided in the fourth paragraph of this section, each commissioned officer * * * shall be entitled at all times to a money allowance for rental of quarters. * * *

The first of the two exceptions mentioned in paragraph 4 applies only to an officer without dependents. The other applies to all officers, and provides that the money allowance is not payable where the officer "is assigned" the number of rooms to which he is entitled. Therefore, to

establish his right to the money allowance an officer must only show that he had not been "assigned" the number of rooms to which he was entitled. This the plaintiff here has done. It is not necessary for him to go further and show that no rooms were available for assignment, although this probably was necessary under the 1922 Act (42 Stat. 625). Under that Act an officer was entitled to a rental allowance only if public quarters were not available; but this provision was eliminated in the 1924 Act, and there was substituted the condition that public quarters had not been assigned.

This change was right and proper. Whether or not there was a room available was known to the defendant, but could not have been known definitely by the plaintiff; he could not know what disposition the Commanding Officer may have had in mind for any vacant rooms. When plaintiff has shown that he had not been "assigned" quarters, he has carried the entire burden placed upon him.

This is not in conflict with *Cornell* v. *United States*, *supra.* There, it appears from the opinion, certain rooms were "made available by the Government." Presumably this means, had been assigned by the Government. It is agreed in this case there had been no assignment. In the absence of an assignment, plaintiff is entitled to the money allowance.

Plaintiff sues for his allowance from February 4, 1932, to September 14, 1932, both inclusive, but he is not entitled to recover any amount due more than six years prior to filing his petition because liability for that is barred by the statute of limitations. Judgment is rendered for the amount due since April 7, 1932, to and including September 14, 1932. No deduction from this amount is made for the value of Government quarters occupied by plaintiff because they were occupied by him prior to this period.

Judgment is rendered against the defendant and in favor of the plaintiff in the amount of $199.47. It is so ordered.

Madden, *Judge;* Jones, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

MACK COPPER COMPANY v. THE UNITED STATES

[No. 44723. Decided December 7, 1942]

On the Proofs

Suit under special jurisdictional act; validity of lease; waste; use and occupancy.—Under the terms of the Act of April 20, 1939 (53 Stat. 1452) conferring jurisdiction upon the Court of Claims, "notwithstanding the lapse of time, prior determination, the invalidity of the lease, or any statute of limitation, to hear and determine the claim of the Mack Copper Company" (63 C. Cls. 562), it is *held* that it was the intention of Congress that the Court should (1) determine the amount of damages and waste that was committed during the period of use and occupancy by the defendant and (2) that the Court should consider anew the validity of the lease and consequently the amount that should have been paid for use and occupancy by the defendant.

Same; validity of lease.—Where lease was not formally authorized by the board of directors of plaintiff corporation but was signed by its president under the corporation seal, was regular in form and was accepted as such; and where no proper notice of repudiation was ever given to defendant, and where said lease was acknowledged in an agreement dated March 3, 1920, between plaintiff and defendant, and was admitted by plaintiff in its pleadings in a suit filed in the United States District Court; it is *held* that the plaintiff by conduct, letters, instruments, and documents affirmatively ratified said lease and said lease was therefore valid.

Same; just compensation.—Where under a previous decision (63 C. Cls. 562) the Court held that there were certain items connected with the use and occupation of the property, in the nature of waste, for which the defendant was not liable, on the theory that the defendant did not hold the property under lease, and that therefore there could arise no implied covenant under which relief could be given within the limited jurisdiction of the Court of Claims; and where in the instant case it has been established by evidence that the property was taken and held under lease and that said lease was valid; it is *held* that for certain items, enumerated in the findings, plaintiff is entitled to just compensation in the sum of $45,300.

Same; recovery.—According to the terms of the lease (which in a previous decision of the Court of Claims, 63 C. Cls. 562, was held not to be valid) the plaintiff should have been allowed only nominal pay for use and occupancy instead of the $79,500 which was allowed in the previous decision; and on its counterclaim the defendant is accordingly entitled to recover $79,499.

Same; net amount due Government.—Where after deducting the amount ($45,300) which the plaintiff is entitled to recover from the sum ($79,499) which is due the Government, there is a net balance of $34,199 due the Government; it was *ordered* that the amount due the plaintiff go as a credit against the larger amount due the Government; that the plaintiff take nothing and that defendant is entitled to recover on its counterclaim the net sum of $34,199 with interest as provided by law from the date of payment of judgment in the previous case.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff. *Mr. Paul E. Haworth* was on the brief.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. During the World War defendant used a portion of plaintiff's lands located near San Diego, California, together with contiguous property, for an Army cantonment known as Camp Kearny.

On March 4, 1924, plaintiff filed an action in the Court of Claims, as the result of which the court awarded plaintiff the sum of $79,500 for the value of the use and occupation of plaintiff's property by the defendant, and the sum of $150,000, together with interest thereon at 6 percent from June 1, 1922, to date of payment, for the value of certain soil scraped up and removed with the manure and sold by the defendant to third parties.

The General Accounting Office in settling this case for payment found the total sum of $279,998.62 due under the judgment, including the accrued interest.

This prior action, identified as D–134, is reported in 63 C. Cls. 562.

Congress under date of April 20, 1939, approved the following jurisdictional act:

AN ACT

Conferring jurisdiction upon the Court of Claims to hear and determine the claim of the Mack Copper Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims of the United States, notwithstanding the lapse of time, prior determination, the invalidity of the lease, or any statute of limitation, to hear and determine the claim of the Mack Copper Company against the United States for the damages and waste inflicted to certain real property owned by the Mack Copper Company and situated in San Diego County, State of California, which real property was taken, used, and occupied by the United States as an Army Cantonment, training camp, or for other military purposes during the period from on or about May 15, 1917, to on or about June 1, 1922, not heretofore paid by the United States to the Mack Copper Company: *Provided*, That the measure of the damages sustained shall not exceed the difference between the value of the land when taken, as already found by the court, and the value of the land when returned to the Mack Copper Company: *Provided further*, That in the event that any suit is brought on said claim pursuant to the provisions of this Act, the court shall reopen and reconsider de novo the claim heretofore adjudicated for use and occupation of said property, if the United States so requests.

SEC. 2. That the Court of Claims of the United States in the hearing and determination of any suit prosecuted under the authority of this Act, is authorized, in its discretion, to use and consider as evidence in such suit, together with any other evidence which may be taken therein, the testimony and other evidence filed by Mack Copper Company and the United States, respectively, in case numbered D–134 on the docket of that court entitled "Mack Copper Company against United States," wherein the court rendered a judgment on the 6th day of June, 1927.

SEC. 3. From any decision or judgment rendered in any suit presented under the authority of this Act a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases (53 Stat. 1452).

On June 12, 1939, and pursuant to the jurisdictional act, the plaintiff filed its petition in the present case, and on December 20, 1939, the defendant filed a special answer and counterclaim.

On February 7, 1940, the court issued an order reopening

the prior case, No. D–134, for reconsideration *de novo*, the order further providing that the testimony and other evidence in the former case be made a part of the record in the present case, with the right to the parties to recall and cross-examine former witnesses, and the right to submit further evidence and testimony.

2. Plaintiff, the Mack Copper Company, is now, and was at the times hereinafter mentioned, a corporation duly organized under the laws of the State of Delaware, for the purpose, among other things, of holding, purchasing, mortgaging, and conveying real estate and personal property in the State of Delaware and elsewhere. A certified copy of the certificate of incorporation, plaintiff's Exhibit 1 (D–134),[1] is by reference made a part of this finding.

On March 26, 1912, Joseph S. Mack, representing himself and others, entered into a written agreement with the Sam Ferry Smith Company wherein it was agreed by and between the parties that the Sam Ferry Smith Company would sell and convey to Joseph S. Mack the following-described real estate in the County of San Diego, State of California, bounded and described as follows:

> Lot 78, Rancho Mission, San Diego, according to partition map thereof made in the action of Juan M. Luco, et al. vs. Commercial Bank of San Diego, et al., and on file in the office of the County Clerk of said County, containing 5,039 acres more or less.

By the terms of the agreement Joseph S. Mack agreed to pay as a purchase price therefor the sum of $300,000, payable as follows: $10,000 at the time of the execution of the contract; $90,000 on or before July 26, 1912; and $200,000 on or before March 26, 1914, together with interest on all deferred payments at the rate of 6 percent per annum from the date of the contract. Joseph S. Mack was to pay all taxes on the tract levied or assessed after the date of contract. The Sam Ferry Smith Company agreed to execute a deed for the lands upon the payment of the $90,000 and to accept a note for $200,000, to be secured by first mortgage upon the premises described in the contract.

[1] The present case requires reference to two sets of exhibits, i. e., those filed in the prior case (D–134) and those filed in the present case (No. 44723). The exhibits in the old case will be designated throughout the findings by adding after the exhibit number "D–134" in parentheses.

3. In 1913 Joseph S. Mack conveyed to Caroline J. Mack all his right, title, and interest in this agreement to purchase.

There was a cloud upon the title to the real estate specified in the agreement, and the Sam Ferry Smith Company was not prepared to execute a deed conveying good title under the agreement until 1917.

4. The Mack Copper Company was organized on November 14, 1916, being organized and existing by virtue of the laws of the State of Delaware. The Mack Copper Company also filed a certificate of incorporation in the State of California May 21, 1917.

Plaintiff's board of directors during the period of 1917–1922 consisted of Joseph S. Mack, President; his brother, Augustus Mack, Sr., Vice-President and General Manager, and Caroline J. Mack, the wife of Joseph S. Mack, Secretary and Treasurer.

Two-thirds of the stock of the plaintiff corporation was owned by Caroline J. Mack and the balance by Augustus Mack, Sr., Joseph S. Mack, and a few other stockholders, some of whom were relatives.

5. The bylaws of the Mack Copper Company adopted December 5, 1916, included the following:

> 9. The annual meeting of stockholders after the year 1916, shall be held on the first Tuesday of June in each year, at the office of the Company in Allentown, Penna., at 10 o'clock A. M. when they shall elect by a plurality vote, by ballot, a Board of three Directors, to serve for one year and until their successors are elected or chosen and qualify, each stockholder being entitled to one vote, in person or by proxy, for each share of stock standing registered in his or her name on the twentieth day preceding the election, exclusive of the day of such election.
>
> * * * * *
>
> 14. Special meetings of the stockholders may be called by the President, and shall be called at the request in writing to the President of or by vote of a majority of the Board of Directors, or at the request in writing by stockholders of record owning a majority in amount of the Capital Stock of the Company issued and outstanding.
>
> * * * * *
>
> 20. Regular meeting of the Board shall be held without notice on the first Tuesday in each month at the

office of the Company in Allentown, Penna., at 10 A. M., or, by order of the Board of Directors, elsewhere on a day and at an hour to be fixed by the Board.

21. A majority of the Directors shall be necessary at all meetings to constitute a quorum for the transaction of any business.

* * * * *

28. The President shall preside at all meetings of the Stockholders and Directors; he shall have general and active management of the business of the Company; shall see that all orders and resolutions of the Board are carried into effect; shall execute bonds, mortgages, and other contracts requiring a seal, under the sale [*sic*] of the Company; shall keep in safe custody the seal of the Company, and, when authorized by the Board, affix the seal to any instrument requiring the same, and the seal when so affixed shall be attested by the signature of the Secretary or the Treasurer.

* * * * *

A copy of the bylaws, plaintiff's Exhibit 8 (D–134), is made a part of this finding by reference.

6. The Mack Copper Company was to a large extent a family affair and the bylaws were more or less ignored by the directors of the company. The board of directors did not meet regularly, and in thirteen years (1916–1929) only two stockholders' meetings were called.

Check stubs and canceled checks were plaintiff's only books of account and plaintiff never sent a financial statement to stockholders.

7. At a meeting of the board of directors of the Mack Copper Company held on January 2, 1917, the following resolution was adopted:

* * * * *

Resolved that the contract for the purchase from Caroline J. Mack, of all of her right title and interest in and to lot 78 of the Ex Mission Rancho, San Diego County, California, be and the same is hereby ratified and confirmed as the act and deed of this company.

Upon motion duly made and carried it was

Resolved that the offices of the company carry out all of the provisions of the contract with Caroline J. Mack to completely vest the title of the lands therein described securely in this company, and at once proceed with the development and sale of the land as the subdivision plans drawn call for, not however, at a less

price than will net to the company $250.00 per acre for the first 500 acres, and when this number of acres have been sold a full report shall be made to Caroline J. Mack, and the officers shall do nothing in further disposing of, or preparing the land for sale until there is an agreement had by the full board of directors, and approved by the stockholders. * * *

Pursuant to this resolution, on April 27, 1917, the Sam Ferry Smith Company deeded and conveyed the said real estate containing 5,039 acres of land, more or less, to the Mack Copper Company, and on that date the Mack Copper Company, by its officers, executed a mortgage upon the real estate to the Sam Ferry Smith Company for the sum of $235,990, with interest at six percent per annum, payable quarterly. Between the date of contract to purchase and the date of conveyance Joseph S. Mack and his associates had paid to the Sam Ferry Smith Company the sum of $102,694.82 on the purchase price of the real estate, and this amount, together with the mortgage of $235,990, made the total consideration for that deed of conveyance the sum of $338,684.82, or an average price of approximately $67 per acre.

8. The real estate thus acquired by the Mack Copper Company was situated on what is known as the Linda Vista Mesa and was located about 9 miles north of the city of San Diego (about 15 miles by road from the business district) and 11 or 12 miles from the industrial center.

The mesa was in general covered by a growth of brush such as mesquite, sage brush, chamiso, and grasses, all of which are native to the arid lands of southwestern United States.

The Mack Copper Company property was intersected by two canyons running generally from the east to the west—Rose Canyon on the northern part of the tract and San Clemente Canyon on the southern part of the tract. The sides of these canyons were rough and steep in character and unfit for any agricultural purpose. There was a stream bed of rough gravel and boulders in each of these canyons over which water flowed during a part of the year, these streams having a maximum flow in the wintertime and being usually dry in the summertime.

These two canyons had approximately 156 acres of bot-

tom land spread over a distance of 3½ miles, the surface soil of which was known as Yolo Gravelly Sandy Loam. These bottom lands would have been fairly good agricultural soil if properly irrigated, but as they were shallow and were underlain at a shallow depth with gravel they would be limited to crops having short roots.

All of the land between Rose Canyon and San Clemente Canyon, and also that part of the land lying south and west of the San Clemente Canyon, was slightly rolling and hummocky in character. A considerable proportion of the land between the two canyons comprised a series of gullies or rough broken land leading into the canyons.

The main eastern portion of plaintiff's property between the canyons had a soil known as Redding Gravelly Sandy Loam. This portion of the land had a surface soil with an average depth of 6 inches and was intermixed with rounded stones ranging in size up to as much as 3 or 4 inches in diameter. This surface soil was underlain with a compact acid clay of one foot in depth. Underneath this was hardpan or subsurface soil of conglomerate which was so cemented together that it was impervious to the passage of water or plant roots. This soil was of very low value from an agricultural standpoint.

The western portion of plaintiff's land between the two canyons, including approximately 200 acres which were subsequently used by defendant for a remount station, was Redding Sandy Loam with an average topsoil depth of 21 inches. This was underlain with about 9 inches of clay, which was in turn underlain with impervious substrata. This soil had limited agricultural possibilities, suitable for grain, vegetables, or other shallow-rooted crops, provided there was sufficient water for irrigation.

On a basis of 100 as typical of the best soil, the following ratings apply to the soils occurring on plaintiff's land:

Yolo Gravelly Sandy Loam	52
Redding Sandy Loam	30
Redding Gravelly Sandy Loam	10

The contours and soil characteristics of the Mack property are shown on soil maps, defendant's Exhibits Nos. 25, 26, 27, 28, 29, 30, 31, and 32, and the soil profiles are illus-

trated in defendant's Exhibit 40, all of which are made a part of this finding by reference.

9. At the time the Mack Copper Company acquired title to the property one shallow well had been dug in San Clemente Canyon, the water from which was used for watering stock.

The watershed of San Clemente Canyon was about 13 square miles in area and that of Rose Canyon about 5 square miles. It would have been possible during a normal year to have irrigated 60 to 75 acres of land from wells sunk in these canyons, but other than this there was at that time no possibility of a water supply being developed either for irrigation or commercial purposes.

The main line of the Atchison, Topeka and Santa Fe Railroad ran through the northwestern part of the property.

The remoteness of the land, lack of water, gas, and electricity, as well as lack of improved roads in 1917, militated against any development for agricultural, industrial, or residential uses.

10. In 1917 the main utility of the Mack Copper Company land and the adjoining mesa lands was for grazing. The mesa lands were not capable of supporting more than one head of cattle for each 20 or 25 acres due to scarcity of grass and lack of water. Based upon rents paid for grazing upon adjoining and adjacent mesa lands, the reasonable rental value of plaintiff's land in 1917 was approximately 50 cents per acre per year.

In April 1917, at the time the property was acquired by the Mack Copper Company, and a month later at the time of the occupation by the defendant, the property had a speculative value of approximately $75 an acre. This value was based on the possible future growth of the city of San Diego which would include the development of a supply of water, and the hope that oil might some day be discovered on Linda Vista Mesa.

The annual taxes for the 5,039 acres were approximately $3,000.

11. Early in May 1917, it became generally known that the Government of the United States was contemplating locating a cantonment in southern California, and the citizens of San Diego began to make every effort possible to

have the cantonment located near that city. A citizens' committee was organized in San Diego for the purpose of inducing the United States to locate the camp in or near San Diego. One of the members of that committee was F. J. Belcher, Jr., who was also chairman of a subcommittee known as the Army Post Committee. On May 21, 1917, the citizens' committee sent the following telegram:

Gen. W. L. Sibert, U. S. A.
Hotel Alexandria, Los Angeles, California.

San Diego offers to give government five year lease, rent free, on approximately eight thousand acres of land located on Linda Vista Mesa as shown on topographic map in possession of your Board. This property to be used by War Department for army training purposes. Also agrees to provide site for artillery range. To cause city water to be piped to the cantonment and be prepared to deliver from one to one and a half million gallons per day on two weeks notice. To deliver gas and electrical energy to cantonment buildings with necessary wiring, electrical current delivered within three days and gas within ten days. To cause spur track from main line of Santa Fe to be built to cantonment within two weeks from receipt of notice by railroad company and to provide necessary side tracks. Construct and maintain necessary highways to cantonment. To use best efforts to secure use of adjoining lands for field maneuvers. Should government determine upon this locality as site for permanent division cantonment, peace strength, our best efforts shall be expended to acquire and donate necessary land.

(Sgd) CITY OF SAN DIEGO,
By L. J. WILDE, *Mayor*,
GEORGE CROMWELL, *City Eng.*
SAN DIEGO CHAMBER OF COMMERCE,
By W. S. DORLAND, *President.*
ARMY POST COMMITTEE,
By F. J. BELCHER, JR., *Chairman.*
SAN DIEGO CONSOLIDATED GAS & ELECTRIC COMPANY,
By H. H. JONES, *General Manager.*
CABRILLE COMMERCIAL CLUB,
By O. E. DARNELL, *President.*
MERCHANTS ASSOCIATION,
By ALFRED D. LAMOTTE, *President.*
MANUFACTURER'S ASSOCIATION OF SAN DIEGO,
By F. M. WHITE, *President.*

12. On May 24, 1917, the United States, acting through Gen. Hunter Liggett, sent the following telegram to F. J. Belcher, Jr., chairman of the Army Post Committee, accepting the site, together with the improvements included in the telegram set forth in the previous finding:

> Reference telegram May first [2] signed by you and other residents SanDiego your proposition give Government five years lease rent free approximately eight thousand acres of land on Linda Vista Mesa is accepted period Map mailed to you tonight showing location cantonment period request you proceed at once carry out your further agreement providing piping for city water to cantonment and delivery gas and electrical energy and to secure construction of spur track from main line Santa Fe Also to construct and maintain necessary highways to cantonment period I shall furthermore recommend to War Department locate permanently cantonment approximately division on this site contingent upon donation to Federal Government necessary land for training purposes.
>
> (Sgd) LIGGETT.

13. Some time between the 5th and 10th of May 1917, a group of soldiers was located on Linda Vista Mesa north of Linda Vista station of the Santa Fe Railroad, and a tent had been erected north of the station but not on the Mack Copper Company property.

Two companies of infantry established the first camp on May 26th and two companies of engineers arrived May 30th to survey the land. The location of this first camp was to the east of Linda Vista station and on the Mack Copper Company property.

14. In May 1917, Joseph S. Mack, the President of the Mack Copper Company, was the only officer and representative of the plaintiff corporation in the State of California. Augustus Mack was absent in Mexico, and Caroline J. Mack, the wife of Joseph S. Mack and the remaining director of the company, was in Allentown, Pennsylvania. The various members of the citizens' committee who were active in securing leases on the mesa land relative to the cantonment, approached Joseph S. Mack with the request that

[2] This date is apparently in error as this telegram has reference to the telegram of May 21, 1917.

he lease some of the plaintiff corporation's land for a period of five years for a nominal consideration of $1. Joseph S. Mack at first refused to enter into any lease agreement.

On May 28, 1917, Mr. G. L. Wilson, who was working on behalf of the citizens' committee and was a personal friend of Joseph S. Mack, contacted Mr. Mack and persuaded him to execute as President of the Mack Copper Company a lease for 2,800 acres of the land of the Mack Copper Company to F. J. Belcher, Jr., as trustee. At the time of signing this paper Mr. Mack made a statement to Wilson, the substance of which was to the effect that he did not think he had legal authority to execute the lease for the corporation.

This lease, which was executed on May 28, 1917, was antedated May 26, 1917, and on the following morning, May 29, 1917, Mr. Mack affixed the seal of the corporation to the lease. The lease included the following:

> 2. That this lease is made with the aforesaid Lessee for the specific purpose of the assignment thereof by the said Lessee to the United States of America, or to such department, division, bureau or individual as may be designated, and upon such assignment all the uses, rights and privileges herein and hereby created shall pass to such assignee without the assumption by him or it of any liability for the payment of rent herein reserved or any part thereof, and that the obligation for the payment of the rent shall be and remain in the said Lessee notwithstanding any assignment of this lease.

A copy of this lease, plaintiff's Exhibit 6 (D–134), is by reference made a part of this finding.

15. In June 1917, the citizens' committee of San Diego again approached Mr. Joseph S. Mack and asked him to sign another lease for an additional 1,200 acres of the Mack Copper Company land, the same to be leased to F. J. Belcher, Jr., as trustee, for the sum of $1 and until May 31, 1922. This lease had the same phraseology with respect to assignment and use of the property, as quoted in the preceding finding. The lease was signed June 22, 1917, by the Mack Copper Company, by J. S. Mack, President, and had affixed thereto the corporate seal.

16. The two leases from the Mack Copper Company to F. J. Belcher, Jr., Trustee, referred to in the preceding find-

ings, 14 and 15, were never assigned by him to the United States. In the fall of 1918 F. J. Belcher, Jr., as Trustee, entered into an agreement with Col. William G. Gambrill, Quartermaster of the Western Department, acting for the United States, covering the lands then occupied as Camp Kearny, including the two tracts mentioned in the leases executed by the Mack Copper Company on May 28 and June 22, 1917. This lease of F. J. Belcher, Jr., Trustee, to the United States was antedated June 1, 1917.

A copy of this lease, plaintiff's Exhibit 9 (D–134), is made a part of this finding by reference.

17. Augustus Mack testified that the first knowledge he had concerning the execution of any leases by Joseph S. Mack was in August 1917, when he returned to San Diego from Mexico, and that he promptly informed the Army officers stationed on the land that Joseph S. Mack had no authority to execute the leases. At that time the cantonment was partially completed.

So far as the record shows the first knowledge that Caroline J. Mack had of the execution of the leases was when Joseph S. Mack went east later in the summer or fall of 1917. At all times mentioned herein Augustus Mack, Sr., held a power of attorney for Caroline J. Mack, and was authorized to act in all corporate matters on her behalf.

The board of directors of the Mack Copper Company at a meeting held on January 10, 1919, refused to ratify the Belcher leases. This was the first directors' meeting held since January 2, 1917. There is no evidence that this action was brought to the attention of the defendant.

18. The following events subsequent to the execution of the leases by Joseph S. Mack relate to and bear upon their validity:

(a) Under date of November 25, 1918, the Mack Copper Company, by Joseph S. Mack, president, wrote to Colonel Oliver, Chief of Staff at Camp Kearny, California, with regard to the future use of the Mack property. This letter in the opening paragraph stated:

> Now that the war is won and the purpose for which our Company granted the leases of our property to the Government, is accomplished, * * *.

This letter is contained in defendant's Exhibit 13, which is made a part of this finding by reference.

(b) On March 3, 1920, plaintiff and defendant entered into an agreement whereby the Government released 80 of the 4,000 acres under lease so that plaintiff could drill an oil well. The first two paragraphs of this release are as follows:

> WHEREAS, the Mack Copper Company of San Diego, California, heretofore leased to F. J. Belcher, Jr., Trustee, among other lands the property hereinafter described; and
>
> WHEREAS, on the first day of June, 1917, the said F. J. Belcher, Jr., Trustee, leased said lands to the United States of America for a term beginning June 1st, 1917, and ending May 31st, 1922, for the sum of $1.00 the said lands, under the terms of the lease, to be used by the United States for the purpose of the establishment and maintenance of an army cantonment or training camp and for such other and further military uses as may be designated by the Secretary of War or other duly constituted authority; and * * *.

Defendant's representatives prepared this release. This release, defendant's Exhibit 17 (D-134), is made a part of this finding by reference.

(c) In an equity action in the United States District Court for the Southern District of California the United States sought an injunction against the Mack Copper Company and others as defendants to restrain them from interfering with the removal of buildings and improvements situated in part upon the lands of the Mack Copper Company.

On January 22, 1925, the United States District Court entered its decree wherein it was decided and adjudged in paragraph 1 as follows:

> That the lease from the Mack Copper Company to F. J. Belcher, Jr., as Trustee, of date May 26, 1917, and the lease from said Belcher to the plaintiff of date July 13, 1917, covering the following described lands:
>
> "Those portions of Sections 18, 19, and 30, Township 15 South, Range 2 West, S. B. M., lying within the limits of Lot Seventy-eight (78) Rancho Ex-Mission; *and also all of Section 13*, except the North half of the

North East Quarter, and all of Sections 24, 25, 26, and 27, in Township 15 South, Range 3 West, S. B. M., all being in Lot Seventy-eight (78) Rancho Ex-Mission, according to the Partition Map on file in the office of the County Clerk of said San Diego County:"

are, by the answers herein, admitted to be valid and accordingly are binding on the parties hereto.

A copy of the decree of the court, defendant's Exhibit 9, is made a part of this finding by reference.

19. Shortly after May 26, 1917, the defendant began the construction of the cantonment known as Camp Kearny. The cantonment comprised a main camp or group of buildings, a remount depot, base hospital, a trench system for instructing the soldiers in trench warfare, and various rifle, machine gun, artillery, and pistol ranges. The relative location of the various portions of the cantonment with reference to each other and with reference to the Mack Copper Company property, is indicated on a map, plaintiff's Exhibit 1, which is made a part of this finding by reference, the approximate property lines of the Mack Copper Company land being indicated on this map in red.

The rifle, machine gun, artillery, and pistol ranges were all located either to the north or east of plaintiff's lands, and none of the gun emplacements, targets, or lines of fire were upon or over plaintiff's property. Neither trench mortar shells nor hand grenades were exploded on plaintiff's land.

20. A portion of the main group of buildings, the base hospital and parade ground, were located on the eastern part of plaintiff's lands between the two canyons, this being that part of plaintiff's lands referred to in Finding 8 as having a relatively thin surface soil and being of low value from an agricultural standpoint.

This land was rough and hummocky in character. The hummocks were one to three feet in height. This area was cleared of brush and after the clearing was completed the defendant proceeded to level these areas by the use of teams, plows, Fresno scrapers, and road graders, the top of the hummocks being cut off and used to fill in the depressions. Prior to leveling this land, its hummocky character, together with the impervious conglomerate subsurface soil, caused

pools of water and mud to accumulate and stay until removed by evaporation, land of this character being known as "hog-wallow" land.

The clearing and leveling of this land was essential to its use as an Army cantonment and would have been necessary for any purpose, other than grazing, for which the land was to be used, and it was therefore not detrimental to plaintiff's property. Something more than 1,000 acres of plaintiff's land were cleared and leveled.

21. The cantonment area proper comprised approximately 750 acres, including a parade ground of about 240 acres. This cantonment area had its surface treated by sprinkling with water and rolling, it being necessary to consolidate the loose material so as to prevent dust during the dry season and mud during the winter season. A little oil was used on the parade ground and around the headquarters buildings.

Approximately 350 acres of this rolled area, including 140 acres of the parade ground, were located upon plaintiff's land.

22. The western portion of plaintiff's land between the two canyons was not leveled. This was the section of plaintiff's land which had the thicker and better topsoil (see Finding 8), and on which the remount depot was located.

The relative location of the parade ground and its surrounding buildings, the hospital area, and the remount depot, is shown on a map, defendant's Exhibit 3, which is made a part of this finding by reference, the red line on this map indicating the approximate northeastern boundary of the Mack Copper Company property. The remount depot comprised a number of barracks for officers and men, a water tank, forage sheds, and numerous corrals for horses and mules.

23. In accordance with its agreement the City of San Diego caused water, gas, and electric power lines to be carried to the cantonment, which utilities were then carried throughout the cantonment by defendant.

An improved concrete road was built from the city to the camp and paid for by the City and County of San Diego.

The Sante Fe Railroad constructed a spur line from its Linda Vista station to the camp, and about 3½ miles of railway track were laid on the plaintiff's land. The railway track on plaintiff's property was constructed on an average fill or embankment of 4 feet.

24. The defendant also constructed 16.72 miles of streets and roads throughout the cantonment, of which approximately one-half were on plaintiff's land. The more important streets in the parade ground and hospital area were constructed of concrete. The sand and gravel used in their construction were purchased in and brought from Los Angeles, California.

The defendant opened a quarry in Rose Canyon to the north of the parade ground where it installed a rock crusher. This quarry, which was not on plaintiff's property, was the source of the crushed stone used for the secondary roads. The crushed rock was laid to a depth of 7 inches and was then surfaced with disintegrated sandstone. There were 12.25 miles of these secondary roads.

The roads constructed on plaintiff's property were not detrimental thereto.

25. Defendant opened a quarry on plaintiff's land north of the remount depot, in which it installed a steam shovel and from which it obtained the red sandstone material used to surface the secondary roads. This red sandstone material was also used throughout the entire cantonment for the surfacing of walks and filling up of holes, and in the remount depot for filling in depressions which occurred from time to time around the feed troughs and watering troughs. About 60,000 cubic yards of material were removed and used by the defendant, the value of this material in place at the quarry being $0.25 a cubic yard. The total value of the material removed was $15,000. A photograph of this quarry, plaintiff's Exhibit 17, is made a part of this finding by reference.

There is no satisfactory evidence that any rock crusher was installed in San Clemente Canyon or that rock was removed therefrom for the use of defendant.

The length and width of road construction are set forth

in the completion report of Camp Kearny, defendant's Exhibit 52, which is made a part of this finding by reference.

26. The cantonment and its principal streets and roads were laid out on the mesa between the two canyons with the roads and streets tending to parallel the contour lines of the canyons which ran in a northeasterly and southwesterly direction. This was more in conformity with the lie of the land than if the streets and roads had been laid out in an easterly and westerly and northerly and southerly direction.

Culverts were constructed under all roads to take care of natural drainage areas. Drainage was provided in the longitudinal direction of the camp by depressing two of the main roads sufficiently below ground level to collect and carry off the rainfall from the whole camp area. An average grade of 0.5 percent was used.

This method of drainage caused some erosion at the lower ends of these roads where the water ran off into the canyons.

While erosion was increased at these points it was necessarily decreased at other places where drainage had previously occurred from the mesa land into the canyons, and such erosion was no detriment to plaintiff's lands.

27. The defendant planted approximately 3,000 trees along the streets and about the buildings to beautify the cantonment. This was accomplished by blasting holes in the impervious subsurface soil, after which these holes were filled with topsoil. The trees were watered periodically. Since the abandonment of the cantonment many of them have died. A few remain on the land at the present time.

During the process of leveling the land, excavating for sewer and water utilities, and building the roads, rounded stones which were in the subsurface soil were exposed. The soldiers used these stones for outlining sidewalks and flower beds, as shown in a photograph, plaintiff's Exhibit 38, which is made a part of this finding by reference. This was done around the quarters and mess halls in the cantonment and parade ground area on about 20 acres of plaintiff's land.

28. The defendant constructed a trench system south of the parade ground and near the edge of San Clemente Can-

yon for the training of the soldiers. This trench system was devised to simulate actual conditions at the front and comprised numerous trenches, cross trenches, tunnels, dugouts, and shell craters, together with barbed-wire entanglements.

This trench system covered approximately 120 acres of plaintiff's land which, at this location, was Redding Gravelly Sandy Loam.

In addition to this area, there were also a few practice trenches in the main camp area.

29. The defendant constructed a sewage disposal system comprising two septic tanks and several miles of sewer pipe and sewer connections leading to the septic tanks from the cantonment.

The larger of the two tanks, hereinafter referred to as tank No. 1, was constructed on the bank of a tributary or side canyon leading to San Clemente Canyon, and this septic tank was utilized to handle the sewage from the parade ground area and main cantonment area.

The smaller septic tank, hereinafter referred to as tank No. 2, was constructed on the bank of Rose Canyon and served the hospital area and remount area. There were no habitations in either San Clemente Canyon or Rose Canyon upon the Mack Copper Company property.

30. The septic tanks were more or less conventional in character. Tank No. 1, which was approximately 48′ x 98′, and had a capacity of 400,000 gallons, consisted of two units of four settling chambers, each about 15′ deep below water level, or 18′ deep over all. The sewage flowed into the settling compartments where the solid matter, including feces, underwent a bacteriological logical digestion, the organic matter to a large extent becoming liquefied and the inorganic portion settling as sludge to the bottom of the settling chambers.

The liquid portion of the sewage flowed from an outlet near the top portion of the settling chambers into a dosing chamber, in which it was treated with liquid chlorine. The chlorinated effluent was periodically siphoned off from the dosing chamber and discharged through an effluent pipe into San Clemente Canyon.

31. The bottoms of the settling chambers were hopper-

shaped and provided with draw-off valves and a pipe through which the accumulated sludge was periodically removed, the sludge discharge pipe discharging into a small tributary canyon leading into San Clemente Canyon. This small canyon was provided with an earth retaining wall.

On at least one occasion the sludge was removed from tank No. 1 by means of clamshell buckets and dumped into the small tributary canyon or the sides of San Clemente Canyon.

Tank No. 1 was of sufficient capacity to properly daily clarify and treat sewage from a population of 27,000 men.

The operation of the septic tanks was checked daily by the camp health officer.

32. With reference to the capacity of tank No. 1 and its ability to satisfactorily digest the sludge, the following is the average number of soldiers stationed at Camp Kearny as indicated:

AVERAGE MILITARY POPULATION OF THE CAMP PER YEAR

Year	Population
1917	16, 496
1918	17, 415
1919	2, 294
1920	603
1921	43

The peak of the population occurred in June of 1918, at which time there were 25,461 soldiers in the cantonment. These figures are obtained from the monthly listing of the camp population, defendant's Exhibit 48, which is made a part of this finding by reference.

During the construction of the camp there was a maximum of 4,570 civilian employees, including workmen, also present. The construction of the major part of the cantonment was completed in December 1917. In the subsequent years 1918–1921 there were also some civilian employees present at the camp, the number of which is unknown.

33. In the usual operation of septic tanks the sludge is discharged onto gravel or sand filter beds to permit a rapid draining of the liquid content and a consequent rapid reduction of the sludge to a dry state. Such drying beds were omitted from the sewage disposal plants at Camp

Kearny and the sludge was left to dry on the sides of the canyon or in the tributary canyon.

Contamination from sludge deposits is not serious from a typhoid or health standpoint, it being generally considered that typhoid organisms have entirely died off in about a week's time. There is, however, an unpleasant odor associated with the sludge beds while they are in a moist condition. As the sludge dries this odor disappears but will reappear when the sludge becomes wet during a rain.

The average sludge deposit, even though it has not been previously completely digested in the septic tank and therefore contains a certain percentage of raw sludge, would have undergone decomposition and become humus or earthy, with practically no odor, in about a year's time.

34. The following tabulation is indicative of the amount of sludge discharged annually from the septic tanks at Camp Kearny. For the year 1917 the figure utilized for the civilian population is the figure obtained from the construction report. For the remaining years the civilian population is based on plaintiff's assumed figure of 15 percent of the military population.

Sewage disposal projects are based on an average figure of 20 to 40 gallons of wet sludge per man per year. The higher figure has been utilized in this table.

The cubic yard ratio of wet sludge to dry sludge has been assumed as 2.5 to 1.

Year	Military population	Civilian population	Total	Total wet sludge at 40 gallons per man per year		Dry sludge	Percentage by years
				Gal.	*Cu. yds.*	*Cu. yds.*	
1917	16,496	4,570	21,066	842,640	4,171	1,668	47.3
1918	17,415	2,612	20,027	801,080	3,965	1,586	45
1919	2,294	344	2,638	105,520	522	209	6
1920	603	90	693	27,720	137	55	1.6
1921	43	6	49	1,960	9.7	4	.1
						3,522	

The odor arising from the septic tanks and from the sludge deposits which were adjacent to or washed down into the canyons would be detrimental to plaintiff's property had it represented a permanent condition. From the above table it will be seen that 92 percent of the sludge had been deposited

prior to the end of 1918, and in the last year only 4 cubic yards, or one-tenth of one per cent was deposited.

At the time that plaintiff took repossession of the property on November 6, 1921, some of this sludge had been washed down the canyons by the winter rains. Practically all of the sludge remaining on plaintiff's land had had approximately three years in which to dry out and return to humus, and whatever effect any remaining odor might have had at that time is too intangible to evaluate.

35. Tank No. 2, which served the hospital and remount areas, was of the same type of construction as tank No. 1 except that it had a capacity of 35,000 gallons and was therefore about 10 percent in size and capacity of tank No. 1.

In the case of tank No. 2, both the effluent and the sludge were discharged into Rose Canyon. (See Finding 51 for further subsequent facts pertaining to tank No. 2.)

36. Adjoining, but outside the western cantonment boundary were 1,039 acres of plaintiff's land which were not included in the alleged Belcher leases for the camp site. The only means of access from the highways to this 1,039-acre tract was through the cantonment area and the lands occupied by the United States. During the occupation period admission through the cantonment was limited to those holding passes or otherwise having permission of the defendant, and the Government maintained a military patrol upon the 1,039 acres and questioned the right of anyone on the property without military passes or permission from the defendant.

The Government pastured a limited number of horses on the 1,039-acre tract, and also used it to a limited extent for military training purposes, such as survey practice by the engineers. A garden, a few acres in extent, was maintained by the cantonment personnel on the 1,039 acres but no structures were erected and no ascertainable damages or waste were committed with respect to this piece of land.

37. During the time the cantonment was in operation and in accordance with the customary sanitary procedure existing in connection with Army camps, all refuse and trash were hauled to an officially designated dump. This was not located on plaintiff's property.

38. The remount depot was located to the west of the cantonment area and on that portion of plaintiff's lands where the topsoil was of better character, consisting of Redding Sandy Loam with a depth of 21 inches. (See Finding 8.) The remount depot covered about 200 acres and included large corrals which were constructed with sheltering sheds and feeding troughs. As shown on the detail cantonment map, defendant's Exhibit 3, the area occupied by these corrals was approximately 116 acres.[3]

During the occupation period, and more particularly from the fall of 1917 to August 1920, large numbers of horses and mules were confined in the corrals. The exact number is unknown, and varied, but the peak was something between 7,000 and 11,000 animals.

39. On September 12, 1917, the Government entered into a contract with the Southern California Fertilizer Company by the terms of which the Company agreed to purchase the Camp Kearny manure at the rate of one-half cent per day per horse. This contract was effective from September 15, 1917, to September 14, 1918, and was succeeded by a similar contract extending the period to June 30, 1919. On June 24, 1919, the Government entered into a contract with a partnership, Fuhr and Hawkins, of California, by the terms of which the Government agreed to sell to the partnership the Camp Kearny manure at 60 cents a month per horse. This latter contract was effective during the period of July 1, 1919, to June 30, 1920.

These were the only manure sales made during the periods above stated and the defendant received by virtue of these three contracts the total sum of $31,879.88.

40. During the period that the manure contracts were in force some 5,000 carloads of manure were shipped from Camp Kearny, approximately two-thirds of it, or 3,333 carloads, being obtained from the corrals.

The manure in the corrals, which for the most part accumulated in the vicinity of the feeding racks, was scraped into windrows by the soldiers, a wooden plank pulled by horses being used as a scraper. The manure was then forked into wagons and delivered to a railroad spur, at

[3] 10.5" x 3" on defendant's Exhibit 3, with a scale of 400 feet per inch, equals 5,040,000 square feet = 115.7 acres.

which point it was taken over by the manure contractor, loaded on cars and shipped from the property.

When the corrals were new and the scraping first started, three cars that were sent out were rejected by the railroad company because of overweight, these cars containing 20 tons of dirt or topsoil in addition to the conventional carload of manure, which weighed 40 tons. During the initial period of manure collection and shipment, 45 or 50 cars were shipped by the Southern California Fertilizer Company from Camp Kearny which were overweight 15 tons each, due to an excessive amount of dirt. Representatives of the manure company objected to the dirt in the manure and to such overweight shipments, which increased the freight rates.

The surface of the corrals then became packed down and the remaining carloads of manure shipped from the corrals contained about the normal or average amount of dirt, which was 3 to 5 percent by weight.

The following table indicates the total amount of dirt or topsoil shipped out of the corral area under the manure contracts:

	Tons
3 cars at 20 tons of dirt per car	60
50 cars at 15 tons of dirt per car	750
3,333 cars—40 tons of manure each with a normal dirt content of 5%, or 2 tons	6,666
Total topsoil	7,476

This topsoil had a value of $1.00 a ton in place, or a total value of $7,476.

41. On several occasions, and particularly when the corral area was new, representatives of the manure companies who were present refused to accept manure for shipment because of its excessive dirt content. This rejected manure was removed from the corrals by the soldiers and dumped elsewhere on plaintiff's property.

Some of this rejected material was used by the defendant throughout the cantonment for fertilizing purposes, some of it given away, and subsequent to June 30, 1920, some was sold to plaintiff for the sum of $146.75.

42. At certain spots in the corrals, and especially adjacent to the watering troughs and feed rack, holes and depressions

were formed in the ground by the hoofs of the congregating animals.

The Government from time to time hauled in disintegrated sandstone from the adjacent sandstone quarry (see previous Finding 25) and filled these depressions, this material having the characteristic of readily packing down and forming a firm surface.

43. The remainder of the manure sold by the Government under the manure contracts came from the stables and the picket lines and was what is known as "straw manure." At first this manure had a slight amount of gravel or small stones. It had no dirt content.

44. On or about October 1, 1920, the Commanding Officer at Camp Kearny advertised for bids for the sale of certain of the Government buildings and improvements. The proposal required alternate bids which subdivided the camp into sections. Thereafter contracts were awarded by the defendant to the highest bidder under each alternate. In each instance these contracts made provision for clearing up all rubbish and debris caused by the contractor's operations and leaving the site in a clean and orderly condition after the buildings and improvements had been removed.

The contracts which are hereinafter referred to in subsequent findings are those which relate to the work of removal and restoration on plaintiff's property.

45. On or about November 22, 1920, the base hospital, together with the sewer and water systems serving it, was transferred from the War Department to the United States Public Health Service of the Treasury Department. The hospital area was therefore excluded from the sale of the cantonment buildings by an amendment to the original proposal for bids of October 1, 1920, referred to in the previous finding.

Prior to May 31, 1922, the Public Health Service transferred ownership of the hospital buildings, structures, and utilities to the United States Veterans' Administration.

46. On December 8, 1920, the defendant entered into a contract with the W. D. Hall Company, El Cajon, California, for the sale of "Buildings, structures, tent frames, and fences in the remount area."

The contract provisions respecting the removal of the buildings, foundations, etc., and the clearing of debris from

the land were identical with those included in the Shelley contract, Finding 47, *post*.

The W. D. Hall Company entered upon the site and began the removal of the buildings as required by its contract. On March 26, 1921, an agreement was entered into between the above contractor and the plaintiff in this case, Mack Copper Company, whereby the contractor sold to the plaintiff certain of the remaining buildings and structures it had theretofore purchased from the defendant and was required to remove.

In accordance with the provisions of paragraph (j) of the specifications attached to and made a part of the W. D. Hall Company contract with the defendant, the contractor and the plaintiff on May 23, 1921, executed a release to the defendant which reads in part as follows:

> WHEREAS the party of the second part [Mack Copper Co.] has agreed with the party of the first part, in an Agreement made the twenty-sixth day of March 1921, that the party of the first part shall leave certain buildings and other conditions as specified in the Agreement made the twenty-sixth day of March 1921;
>
> That the two Agreements: one made the eighth day of December 1920 between the party of the first part and the United States Government, and one made the twenty-sixth day of March 1921 between the party of the first part and the party of the second part, have been complied with in full to the satisfaction of the United States Government and the party of the second part, and the party of the second part does hereby release the United States Government from all claims, so far as is concerned in the Agreement made the eighth of December 1920 between the party of the first part and the United States Government, with reference to restoring the property owned by the party of the second part, and occupied by the Remount Depot and lands adjacent thereto, to as near its original condition as before used by the United States Government, in compliance with the requirements of the Agreement made by the party of the first part and the United States Government as laid down in Circular Proposal Number Three dated Camp Kearny, California, October first, 1920.

The contract of December 8, 1920, defendant's Exhibit 2, and a copy of the contract of March 26, 1921, between plaintiff and the W. D. Hall Company, together with the release

dated May 23, 1921, defendant's Exhibit 1, are made a part of this finding by reference.

47. On December 15, 1920, the defendant entered into a contract with George Shelley & Sons, San Diego, California, for the sale of "buildings, structures, and tent frames in the Main Cantonment Area South of the Santa Fe tracks." The above-described area included all of the western part of the parade ground and camp, which part was on plaintiff's land.

Under this contract the purchaser of the above described buildings agreed, among other things—

> (a) To remove the property purchased from the Government Reservation, including all trash, rubbish and debris caused by his operations, and leave the site in a clean, orderly condition.
>
> * * * * *
>
> (f) To furnish the Government with properly executed copies of any releases that may be obtained by him from the property owners affecting occupancy of the ground, or removal of any structures or utilities thereon.

The specifications attached to and made a part of the above contract provided in part as follows:

> 4. *General Conditions.*
>
> (j) Each purchaser is required to clear the area covered by his purchase to clear the sites of buildings, remove foundations, sidewalks and fill all excavations in said areas as the trenches in the Main Camp Area, and to thoroughly clear up the land. Provided any purchaser may obtain a written release from any landowner excusing the purchaser from compliance with this paragraph in form satisfactory to the Quartermaster General's Office.
>
> (l) All roads will remain in place as they stand on the date of these specifications and * * * shall be left undisturbed and as they are by the contractor or contractors.
>
> * * * * *
>
> 10. *Restoration.*
>
> The following work will be done unless permission is given in writing by the property owner to the contrary.
>
> (a) All debris, rubbish and property sold shall be either burned, or buried with the consent of owners of land, or be entirely removed.

(b) All foundation walls and piers, all foundation posts, and all sidewalks and concrete floors shall be removed from the site.

(c) All holes or trenches resulting from the removal of piping, conduits, foundation walls, piers, and posts shall be filled level with surface of ground, * * *.

48. The contractor entered upon the site, removed the buildings and concrete foundations, filled the depressions, and otherwise cleared the site as required by his contract.

The contractor was informed by the contracting officer that the contract did not cover the removal of the stones used to outline flower beds and walks, and these were not removed.

After the work was completed a representative of the contractor, Augustus Mack, Sr., plaintiff's Vice-President and General Manager, and the contracting officer made a tour of inspection of the area cleared on plaintiff's land. It was agreed by these parties that the work specified in the contract had been completed in a satisfactory manner.

Upon completion of the contract the contracting officer by letter dated November 7, 1921, advised the Quartermaster General as follows:

> * * * The contractors have complied with the requirements of said contract, removed all improvements purchased and cleared and leveled the ground. * * *

The contract herein mentioned and the contracting officer's letter of November 7, 1921, are in evidence as defendant's Exhibits 19 and 24 and are made a part of this finding by reference.

49. On November 6, 1921, plaintiff took possession of its land, although subsequent to that date a few of defendant's employees remained on the property to supervise the sale and removal of surplus property, building, and utilities.

Defendant's Exhibit 48, referred to in Finding 32 and made a part thereof and which is indicative of the military personnel stationed at the camp per month, shows the average military personnel per month for the year 1921 to be 43, and from March to August of 1922 the average by the month to be 9.

50. In June 1922, the plaintiff entered into a lease with the Veterans' Administration for the 320-acre tract of its

land covering the hospital site and its utilities, including the sewage system and septic tank No. 2 which discharged into Rose Canyon.

The Veterans' Administration operated the hospital for the treatment of disabled veterans under its lease with the plaintiff from June 1, 1922, to some time during the year 1926, at which time the hospital site was abandoned.

Upon abandonment of the hospital the defendant through the Veterans' Administration advertised the hospital buildings and utilities for sale. This advertisement and specifications attached thereto contained the usual clauses requiring the successful bidder to remove the buildings, foundations, concrete piers, and other obstructions and to thoroughly clear up and level the land.

The high bidder was the Mack Copper Company, the plaintiff in this case, who thereafter entered into a contract with the defendant and thereby assumed the responsibility of restoring and clearing its own land.

The plaintiff executed a release to the United States, which read in part as follows:

> KNOW ALL MEN BY THESE PRESENTS that the Mack Copper Company, a corporation of the State of Delaware, has received from the United States the sum of Eighty Thousand Dollars ($80,000), the receipt of which is hereby acknowledged and confessed as follows: * * *
>
> And in consideration thereof the Mack Copper Company does hereby release, exonerate, discharge, and acquit the United States, and the United States Veterans Bureau of and from all and every action, suit, claim or demand which has, could or might possibly be brought, exhibited or prosecuted against the United States or the United States Veterans Bureau on account of the use and occupation of the hereinafter described land by the United States Veterans Bureau for the purpose of a hospital known as Veterans Hospital, No. 64, located in the County of San Diego in the State of California described as follows:—
>
> *   *   *   *   *
>
> The Mack Copper Company further agrees in consideration of the above premises that same shall constitute a complete receipt, release and acquittance to the United States, and to the United States Veterans Bureau, of all claims or demands for damages or injuries

to the Mack Copper Company arising from or out of the use and occupancy of its lands or any part thereof for the purpose of tubercular patients.

And, the Mack Copper Company stipulates that nothing herein nor anything done in pursuance hereof is to be considered or construed as acknowledgment of the validity of or a ratification of leases purporting to have been executed by the Mack Copper Company through its President for lands of the Mack Copper Company to F. J. Belcher, Jr., Trustee, dated May 26, 1917, and June 22, 1917, or any other date, or of a lease bearing date of June 1, 1917, by F. J. Belcher, Jr., Trustee, purporting to lease to the United States any of the lands belonging to the Mack Copper Company, or of any other act of said F. J. Belcher, Jr., Trustee, relating to the lands of the Mack Copper Company. The Mack Copper Company specifically reserves the right to all issues, claims, and rights of the Mack Copper Company against the United States, as set forth in a suit by the Mack Copper Company against the United States in the United States Court of Claims, Docket No. D–134, and any amendments thereof filed or to be filed, and specifically reserves all rights and claims of the Mack Copper Company against the United States arising out of or from the occupancy and use of the United States of lands of the Mack Copper Company for the purposes of a military training camp or cantonment, except as the same may be released by these presents, and the Mack Copper Company reserves the right to present, prosecute and sue on any and all of the rights, issues, and claims hereby reserved, except that it is hereby specifically agreed that no claim or demand may be prosecuted by reason of the damage to any land of the Mack Copper Company occasioned by or arising out of the presence and treatment heretofore of tubercular patients in or at the hospital area hereinbefore described.

The proposal for sale of the hospital, together with the specifications, defendant's Exhibit 10; the lease between the plaintiff and the Veterans' Administration, plaintiff's Exhibit 15 (D–134), and the release, defendant's Exhibit 11, are made a part of this finding by reference.

51. Any detrimental odor arising during the period from June 1922 to 1926 and subsequent thereto from tank No. 2 or from the sludge deposits therefrom would be due to the operation of the Veterans' Administration Hospital un-

der its lease from the Mack Copper Company, and would be covered by the release quoted in the previous finding.

Any sludge deposited in Rose Canyon from tank No. 2 during the military occupation of Camp Kearny and prior to plaintiff's repossession of its lands on November 6, 1921, would have had five to six years in which to dry out and become humus (see Finding 34), and if any odor remained from this previously deposited sludge its effect is too intangible to evaluate.

52. On or about July 3, 1922, the defendant advertised the sale of all Government-owned improvements and utilities which had not been disposed of under the previous proposal of October 1, 1920.

Still remaining on plaintiff's land at this time were utilities such as—

(1) The sewer system complete with septic tanks;
(2) The outside electric system;
(3) The water system; and
(4) The railroad tracks including the rails, ties and trestles which had previously been purchased by the defendant from the Santa Fe Railroad.

On September 23, 1922, the defendant entered into a contract of sale with Weissbaum and Company, who immediately proceeded with the work of removing the aforesaid utilities from plaintiff's land. The specifications included in this contract were explicit as to the work to be performed with respect to the removal of each utility and the restoration and clearing of the land thereafter.

The general provisions relating to restoration and to the removal of the sewer system were as follows:

10. RESTORATION: The following work will be done unless permission is given in writing by the property owner to the contrary.

(A) All debris, rubbish, and property sold must be either burned or buried with the consent of owners of land, or entirely removed.

(B) All foundation walls and piers, all foundation posts, and all sidewalks, concrete floors, tennis courts, and incinerators shall be removed from the site.

(C) All holes or trenches resulting from the removal of pipes, conduits, foundation walls, piers, posts, and so on, shall be filled level with the surface of ground

however, roads and culverts shall be left undisturbed as they are by the contractor or contractors.

* * * * *

4. (D) *The purchaser of the railroad tracks and trestle* obtains all railroad track material, including the trestle next to West Street, except the tracks specifically exempted from the sale. * * * No leveling need be done and culverts will be left in place and as they are.

* * * * *

(F) *The purchaser of the sewer* system obtains all sewer pipes, flush tanks and manholes of the sewer system in the Main Cantonment. All material purchased under this proposal must be removed provided that the top of pipes is less than two (2) feet six (6) inches from the surface of the ground and provided that manholes and flush tanks must be removed except only such portions thereof as lie below two (2) feet six (6) inches from the surface of the ground. The entire septic tank must be removed. The disposition of the sludge from the septic tank will be strictly in accordance with directions to be issued by the Commanding Officer at Camp Kearny so that there will be no objectionable features from a sanitary standpoint.

Weissbaum was prevented from completing his contract in 1922 due to a dispute between the plaintiff and the defendant as to the ownership of the utilities. The resulting litigation [4] delayed work under the contract until the spring of 1925. A copy of the contract, defendant's Exhibit 5, is by reference made part of this finding.

53. On April 15, 1925, plaintiff entered into an agreement with the contractor Weissbaum, whereby it purchased all utilities not then removed from its land and released Weissbaum from any further work under his contract with the defendant.

On June 8, 1925, the plaintiff executed a release relieving defendant of all responsibility for the removal of the aforesaid utilities. This release and waiver stated in part as follows:

ARTICLE II. WHEREAS, the United States Government, on or about the 26th day of May 1917, established and until some time during the year 1922, maintained an army training camp, known as Camp Kearny,

[4] See *Weissbaum* v. *The United States*, 72 C. Cls. 423.

upon the said hereinafter described and adjoining property; and as a part of the equipment of said training camp, constructed and erected certain buildings, and installed certain utilities, such as, among others, a water system, sewer system, electric light and power system, and

ARTICLE III. WHEREAS, the United States Government has discontinued the use of the said training camp, and of all of said utilities except certain parts thereof (serving what is known as the Hospital Area and otherwise, which have been specifically reserved), and has sold to G. Weissbaum of San Francisco, California, certain of said buildings, and utilities, with said exceptions and reservations, and other improvements, upon the said lands of said Mack Copper Company, under a contract which obligated the said purchaser to remove the property covered by said contract according to the terms and specifications thereof and restore the premises as therein directed, and,

ARTICLE IV. WHEREAS, there remains on said premises on this date, portions of said utilities required to be removed by the terms of said contract, to-wit:

(a) The sewer system, together with the septic tank, manholes and flush tanks thereof;

(b) The water system, consisting of all water pipes, iron and wood, valves, fire hydrants and fittings;

(c) The electric pole lines for light and power;

(d) Such number of railroad ties as had not been removed on June 6, 1925;

(e) Certain unfilled trenches and certain unfilled holes from which pipes and poles have been removed.

ARTICLE V. NOW, THEREFORE, in consideration of the premises and of the benefits to us accruing, the undersigned corporation, pursuant to a resolution of the Board of Directors of said corporation, adopted at a called meeting on the 8th day of June, 1925, a copy of which is attached hereto, authorizing the same, do hereby give our full consent that all of the aforesaid Government installed improvements, as described in Article IV of this instrument, shall not be removed by the said G. Weissbaum, and may remain upon said premises as they are found thereon and therein this day, and we do hereby release the Government of the United States of America from any and all claims for damages of any kind or nature caused or growing out of the failure of the Government of the United States to remove said portions of said specifically described utilities and uncompleted work listed in Article IV of said instrument.

A copy of this release, defendant's Exhibit 4, is made a part of this finding by reference.

54. None of the contracts for the sale of property or restoration of plaintiff's land related to the following items, which were left in an unrestored condition and which were a detriment or damage to plaintiff's land:

(a) The railroad embankment (Finding 23);
(b) The stones used to outline the flower beds and sidewalks (Finding 27);
(c) The trench area (Finding 28).

In addition to these the following items also relate to a damage or taking of plaintiff's property:

(d) Rolling and packing 350 acres of land, including a portion of the parade ground (Finding 21);
(e) Sandstone removed from quarry (Finding 25);
(f) Topsoil removed with manure (Finding 40).

Other than these listed items, there is no satisfactory evidence of any other ascertainable damages, waste, or taking with respect to plaintiff's land.

55. During the occupancy by the Government it constructed on plaintiff's land 3½ miles of single track railroad. In some places the railroad track was level with the surrounding land and in other places a high embankment was constructed. The average fill or embankment for the 3½ miles of railroad was 4 feet. The embankment on plaintiff's land was made largely of rock, gravel, and other hard material brought in by the railroad, and also in part by scraping the soil from borrow pits along the railroad embankment. A photograph, plaintiff's Exhibit 7, which is made a part of this finding by reference, is illustrative of a portion of the embankment as left on plaintiff's property.

The cost of removing the embankment and restoring this ground to its original condition when the Government took possession would be approximately $17,500.

56. The cost of removing the stones used to outline the flowers beds and sidewalks around the quarters and mess halls in the cantonment and parade ground area, on about 20 acres of land, at $15 an acre would be $300.

57. To restore the trench area and refill the trenches and dugouts would require some 35,000 cubic yards of material. The cost of restoration of this area of 120 acres would be approximately $300 per acre and would exceed the value of the land at the time of occupation, which was $75 an acre. Just compensation for damages and waste to this area at $75 per acre is the sum of $9,000.

58. The 350 acres of plaintiff's land which were rolled and packed down in order to provide a hard surface for a portion of the parade ground and cantonment area, would have to be plowed and the soil loosened up in order to restore it to its original condition for grazing purposes. It would cost approximately $10 an acre to plow this land, or a total sum of $3,500.

59. As set forth in Finding 25, *supra*, the 60,000 cubic yards of sandstone removed from the quarry operated by the Government on plaintiff's land had a value of $0.25 a cubic yard in place. The total value of the sandstone taken is $15,000.

60. As set forth in Finding 40, *supra*, the topsoil removed from the corral area had a total value of $7,476. That amount would be just compensation for such taking.

61. In 1922 and subsequent to defendant's occupancy of plaintiff's land, and due in part to the growth of San Diego and the new highway from San Diego to the cantonment area, plaintiff's 5,039 acres of land had an average speculative value of $90 to $100 per acre.

62. The period of occupancy of plaintiff's land was from about May 26, 1917, to November 6, 1921, or approximately 4½ years.

Just compensation for the taking of the 4,000 acres of plaintiff's property within the cantonment area for use by the defendant for this period at $1 per acre per year is $18,000.

Just compensation for the taking of the 1,039 acres of plaintiff's land outside the cantonment area, but which defendant used for grazing purposes and to which defendant controlled access during the occupation period, at $0.50 per acre per year, is $2,337.75.

63. The total just compensation due plaintiff at the time of repossession of its property on November 6, 1921, is summarized from the indicated findings, as follows:

Removal of railway embankment (Finding 55)	$17,500.00
Removal of stones (Finding 56)	300.00
Trench area (Finding 57)	9,000.00
Plowing of hardened ground (Finding 58)	3,500.00
Sandstone taken from quarry (Finding 59)	15,000.00
Topsoil taken from corrals (Finding 60)	7,476.00
Taking for use and occupancy (Finding 62)	20,337.75
Total	73,113.75

64. The total amount paid to the plaintiff by defendant under the prior judgment in *Mack Copper Company* v. *The United States*, 63 C. Cls. 562 (No. D-134), and including interest, was $279,998.62.

The court decided that there was due plaintiff from the defendant the sum of $45,300.00 and that there was due the defendant on its counterclaim against the plaintiff the sum of $79,499.00; that after deducting the amount which plaintiff was entitled to recover from the larger amount which defendant was entitled to recover on its counterclaim, there was due the United States the net sum of $34,199.00, together with interest as provided by law.

JONES, *Judge*, delivered the opinion of the court:

This is an action by plaintiff for damages and waste alleged to have been committed by the defendant upon plaintiff's lands near San Diego, California, during their use as an army cantonment.

A previous suit was instituted and recovery was had by plaintiff on certain phases of the claim.[5] Because of the decision of the court in that case that it had no jurisdiction over certain parts of the claim for damages and waste, the Congress in April 1939 passed a special act (53 Stat. 1452) conferring jurisdiction upon the Court of Claims in reference to these matters. There is a difference between plaintiff and defendant as to the extent of the jurisdiction conferred by the special act. The plaintiff contends that the jurisdiction

[5] *Mack Copper Company* v. *The United States*, 63 C. Cls. 562.

is limited to plaintiff's claim for damages and waste which was not adjudicated in the previous decision and to a trial *de novo* on the question of the value of use and occupancy of the property as permitted by the second proviso; and that consequently any counterclaim on the part of the defendant is limited to the recovery of any excess that may have been paid by the Government for the use of the property during the period in question. The defendant asserts that the terms of the special act confer complete jurisdiction for a redetermination of all phases of the claim.

The special act which is set out in full in the preliminary part of the findings provides:

> * * * That jurisdiction * * * is hereby, conferred upon the Court of Claims of the United States, notwithstanding the lapse of time, prior determination, the invalidity of the lease, or any statute of limitation, to hear and determine the claim of the Mack Copper Company against the United States for the damages and waste inflicted to certain real property owned by the Mack Copper Company * * * which real property was taken, used, and occupied by the United States * * * during the period from on or about May 15, 1917, to on or about June 1, 1922, *not heretofore paid by the United States to the Mack Copper Company*: * * * [Italics supplied.]
>
> *Provided further*, That in the event that any suit is brought on said claim pursuant to the provisions of this Act, the court shall reopen and reconsider de novo the claim heretofore adjudicated for use and occupation of said property, if the United States so requests.

The issue arises primarily over whether the proviso has the limited meaning contended for by the plaintiff or whether it confers the broad jurisdiction to reopen all phases of the claim heretofore adjudicated.

The special bill as first introduced did not contain the quoted proviso. The House Committee Report accompanying the bill contained the following language:

> After the land was returned to the Mack Copper Co., the latter brought suit in the Court of Claims to recover the value of the use and occupation and damages for waste. The court made an award for the reasonable value of the use and occupation, and a further award for the value of certain topsoil that had been removed

and sold by the Government. The amount so awarded for the topsoil was the exact amount which the Government received when it sold the same. This item of the award was made on the theory that the Government appropriated the topsoil. The Court of Claims refused to consider the claim for waste upon the ground that, as the Government was not a lessee, no covenant against waste could be implied (*Mack Copper Company* v. *United States*, 63 C. Cls. 562). The Attorney General points out that it should be borne in mind in this connection that the Court of Claims has no general jurisdiction over tort claims.

A prior bill (S. 1876, 74th Cong.), conferring jurisdiction on the Court of Claims in this matter, was pocket-vetoed in September 1935 because, as stated by the Attorney General:

"It was too broad in its terms and would have permitted a reopening of the entire case, instead of only the item which was dismissed by the Court of Claims without a decision on the merits."

House bill 2595, as amended, follows the language recommended by the Attorney General and no longer contains features objectionable to either the War Department or the Attorney General. The committee amendment was prepared by the Attorney General and adopted by your committee at the suggestion of both the Attorney General and the Secretary of War.

Reports by the Attorney General and the Secretary of War, to the chairman, Committee on War Claims, in which no objection is interposed to the enactment of this bill, as amended, are appended hereto and made a part of this report.

The report of the Attorney General to the Committee was made a part of the Committee Report, and contains the following language:

The court awarded the sum of $79,500 as the reasonable value of the use and occupation, and a further sum of $150,000 as the value of certain topsoil that had been removed and sold for that sum by the Government, the latter award being made on the theory of a taking. The Court of Claims refused to consider the claim for waste upon the ground that, as the Government was not a lessee, no covenant against waste could be implied (*Mack Copper Co.* v. *United States*, 63 C. Cls. 562, decided June 6, 1927). It should be borne in mind in this connection that the Court of Claims has no general jurisdiction over tort

> claims. The purpose of the bill under consideration appears to be to permit an adjudication on the merits of this item of the claim.
>
> A prior bill (S. 1876, 74th Cong.), conferring jurisdiction on the Court of Claims in this matter, *was pocket-vetoed in September 1935 because it was too broad in its terms and would have permitted a reopening of the entire case*, instead of only the item which was dismissed by the Court of Claims without a decision on the merits. [Italics supplied.]

The report of the Secretary of War to the House Committee on War Claims was also made a part of the Committee Report accompanying the special bill, and reads in part as follows:

> However, in February 1933 there was discovered in the files of the War Department an original document dated March 3, 1920 (copy enclosed), which, if it had been made available to the court, might have established the validity of the leases which the court declared to be invalid. As the leases in question recited a consideration of $1, while the court awarded damages of $79,500 on the implied contract, any reconsideration of the case *should provide for a reopening of the question of the validity of the leases*, and an opportunity for the court to consider the document of March 3, 1920.
>
> * * * * *
>
> You are advised that the War Department has no objection to the proposed legislation, *provided that it is amended so as to permit the court to reconsider its opinion on the validity of the leases and, if it is found that they are valid and that the Mack Copper Co. has been overpaid for use and occupation of the land, that the amount of such overpayment be applied to any award which may be made on claims for waste*, with judgment for the United States in case of any excess. [Italics supplied.]

In its opinion in the previous case the court stated "We are of opinion that the Government never had, so far as the record shows, any valid lease of the plaintiff's property for any period of time" and that it therefore "became liable to compensate the plaintiff for the value of said *use and occupation*." [Italics supplied.] It fixed the reasonable value of said use and occupation at $79,500. The court also found that the defendant had removed topsoil from the property which it sold to third parties and for which

it received the sum of $150,000. It held that plaintiff was entitled to recover this amount on account of such removal and sale. The court then held that there were certain other things connected with the use and occupation of the property in the nature of waste for which the defendant was not liable as it did not hold the property under a lease, and that therefore there could arise no implied covenant under which relief could be given within the limited jurisdiction of the Court of Claims.

In the previous case the attorneys for the defendant presented very little testimony. In that case the plaintiff's testimony covered 1,260 pages, the defendant's only 30 pages. In the case at bar a great deal of new testimony was presented. The attorneys for the defense made a very thorough investigation and presented the facts respecting all phases of the case much more fully and completely. It appears from the testimony in this case that a much greater amount was allowed in the previous decision for the removal of topsoil than the facts as they now appear before the court would have justified. We have no doubt that had the facts been fully presented to the court in the previous hearing as they now appear in the record the amount of recovery allowed on this item would have been a great deal less than the amount that the plaintiff in that case was permitted to recover.

However, in the light of the terms of the special jurisdictional act under which this suit is brought, especially when read in connection with the accompanying Committee Report from which we have quoted, it is doubtful whether it was the intention of the Congress that this phase of the case should be readjudicated. But there is no doubt that it was the intention of the Congress that the court should determine the amount of damages and waste that was committed during the period of use and occupancy by the defendant, and that it should also consider anew the question of the validity of the lease and consequently the amount that should have been paid therefor by the defendant.

The facts in detail are set out in the findings, are approved, and will not be repeated here.

This is a strange and unusual case. The land was located

9 miles north of the city of San Diego, about 15 miles by rail from the business district and about 11 or 12 miles from the industrial center. It had very little value intrinsically except for grazing purposes, for which it was worth about 50 cents an acre per year. The annual taxes were about $3,000. Its chief value was because of its location and due to its distance from the city this was somewhat speculative.

It was undoubtedly its speculative as well as its prospective value that plaintiff had in mind when the contract of purchase was negotiated. At one time during the use and occupancy by the defendant the plaintiff entered into a contract with a company for the development and sale of a portion of the land as a subdivision. Only a few lots, however, were sold.

We have gone through the conflicting testimony of this rather fantastic record. Much of it is confusing, but certain facts stand out clearly in the light of the testimony taken in both hearings.

There are undoubtedly certain items of damage and waste to which plaintiff is entitled and which were not considered by the court in the previous action.

After fully considering the testimony in both cases we have no doubt there was a valid lease. True, it was not formally authorized by the Board of Directors, but this was largely a family corporation and the Board of Directors rarely met. The lease was signed under seal by the president of the corporation, was regular in form, and as such it had been accepted. Not only was no proper notice of repudiation ever given to the defendant, but the plaintiff by conduct, letters, instruments, and the document of March 3, 1920, affirmatively ratified it and the lease was therefore valid. [Finding No. 18.]

It is true that one of the stockholders testified that he orally advised some of the army officers at the camp that the execution of the lease was not authorized, but he admitted that this was several months after it had been accepted, and construction of the cantonment was well under way. There was nothing in writing to support this testimony. On the contrary, the plaintiff wrote letters referring to the Govern-

ment lease on its property, admitted it in its pleading in a suit filed in the United States District Court for the Southern District of California, and acknowledged it in the document of March 3, 1920. Shining through the record are many facts and circumstances that indicate that no one would have been more disappointed than plaintiff had the defendant moved off the property in the early part of its occupancy.

According to the terms of the lease the plaintiff should have been allowed only nominal pay for use and occupancy instead of the $79,500 which was actually allowed in the previous determination.

There is no doubt that certain improvements made by the defendant and those necessarily made by others because of the location of the defendant's activities on the property added to its speculative value. There seems little doubt that the plaintiff having this value in mind was anxious that the activities of the defendant continue and that it hoped to finally sell the property to the Government, or if not, to sell unused parts of it for an added sum because of the activities of the Government. In view of the nature of the value of this property and the circumstances disclosed in the findings and made especially clear by the evidence in the case, the plaintiff had every reason to acquiesce in and to ratify the lease contract.

The plaintiff is entitled to recover the amount of the first 5 items set out in Finding 63, a total of $45,300. It is not entitled to the item of topsoil because this was included in the previous determination and payment. It is not entitled to the lease item for use and occupancy in view of the terms of the lease.

The defendant is entitled to recover by way of counterclaim the sum of $79,499.

After deducting the amount which plaintiff is entitled to recover from the sum which is due the Government, there is a net balance due the Government of $34,199.

While the plaintiff is due the amount indicated, it should go as a credit on the larger amount due the Government. The plaintiff, therefore, takes nothing and the defendant is entitled to recover on its counterclaim against the plaintiff the

net sum of $34,199, together with interest thereon as provided by law from the date of payment of judgment in the previous case.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JOHN McSHAIN, INC. & JOHN McSHAIN v. THE UNITED STATES

[No. 44743. Decided December 7, 1942]

On the Proofs

Government contract; small scale drawings a part of the contract.—Where plaintiffs entered into a contract to furnish all materials and labor and to perform all necessary work for the construction of two Government buildings, the drawings and specifications being made a part of the contract; and where a subcontract for all steel and iron to be used in one of the buildings called for the installation of steel guards or casings around all free standing columns contemplated by the construction contract between plaintiffs and defendant; and where in the small scale drawings 576 free standing columns were indicated but only 44 such columns were shown in the detail drawings; it is *held* that the contract, including the drawings, schedules, and specifications, all of which were available to the subcontractor when its estimates were prepared, called for the furnishing of 532 steel column casings, in accordance with the decision of the supervising engineer, in addition to the 44 which the subcontractor had contemplated in submitting its bid, and the plaintiffs are accordingly not entitled to recover.

Same; drawings a part of contract.—The small-scale drawings were part of the contract and read in connection with the finish schedules show clearly that the controverted 532 casings were included.

The Reporter's statement of the case:

Mr. P. E. Edrington for the plaintiff.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, John McShain, Inc., is a corporation organized under the laws of the State of Delaware, and the plaintiff, John McShain, an individual, is a citizen of the United States, and both are engaged in the construction business with offices in the City of Philadelphia, Pennsylvania.

2. Plaintiffs, on June 5, 1936, entered into a written contract Tlpw-4632 with the defendant through Admiral C. J. Peoples, Director of Procurement, Treasury Department, as the contracting officer. Under this contract, plaintiffs agreed to furnish all labor and materials and perform all work for the construction of an additional building for the Bureau of Engraving and Printing and also a new building for the Bureau of Economics, Department of Agriculture, Washington, D. C., for the sum of $4,657,300.00 in accordance with the specifications, schedules, and drawings referred to in said contract and made a part thereof. The contract, specifications, and drawings are by reference made a part of this finding.

3. In the contract, it is provided:

> ARTICLE 2. *Specifications and drawings.*—* * * Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. * * *
>
> ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.
>
> ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized repre-

sentative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 21. *Definitions.*—(*a*) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the term "his duly authorized representative" shall mean any person authorized to act for him. * * *

(*b*) The term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative.

4. The specifications provide among other things as follows:

1–4. SCOPE.—The work to be done hereunder includes the furnishing of all labor and material and performing all work for the construction complete (except as noted under "Work not Included") of an additional building for the Bureau of Engraving and Printing * * * as indicated on the accompanying drawings and/or specified herein, including all work incident thereto also including the following items:

* * * * *

1–36. SPECIFICATIONS.—This specification is intended to supplement the drawings and, therefore, it will not be its province to mention any portion of the construction which the drawings are competent to explain, and such omission shall not relieve the contractor from carrying out such portions indicated only on the drawings, and should items required by the specification not indicated on the drawings they shall be supplied even if of such nature that they could have been indicated thereon.

1–38. INTERPRETATIONS.—The decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final. The Assistant Director of Procurement, Public Works Branch, is the duly authorized representative of the contracting officer.

17–1. GENERAL.—All miscellaneous and ornamental iron and steel work shall be furnished and installed complete with all necessary anchors, bolts, hardware and other accessories.

17–2. Details cited under this heading are referred to only as illustrative of the character of the work required and are not assumed to show the extent of the work specified or shown on drawings not mentioned by number.

17–39. STEEL WAINSCOT where indicated, and all steel covering on walls, such as steel jackets on columns, curved steel plate guards at freight elevator entrances and bins in Paper Custody Storage Rooms shall be 1/8 inch thick steel plate unless otherwise shown. * * *.

5. In the contract drawings 2–1 to 2–10, inclusive, the floor plans of the building from basement to attic, are shown on scale 1/16 inch to a foot. On these drawings are legends or notations in each area denoting the finishes applicable to the particular areas upon which they are shown. These finishes are set forth in detail on Sheet 2–228 of the contract drawings identified as "Finish Schedule." They are designated as finishes 1, 1–A, 2, 2–A, 2–B, 3, 3–A, 3–B, 3–C, 4, 5, 5–A, 5–B, 5–C, 6, 6–A and 7. The particular finishes considered in this case are 1, 1–A, 2, 2–A, and 2–B.

6. These finishes appearing on Sheet 2–228 carry the following details:

No. 1. Concrete floor, cement finish. Painted walls, painted ceiling slab, combination metal buck, jamb & trim. Free standing columns to have 1/8″ steel guard, 4′6″ high, corners of columns chamfered above guard. Column painted to match wall. See detail finish No. 2.
No. 1A. Same as finish No. 1, except ceiling to be acoustical tile, applied directly to slab.
No. 2. Concrete floor, cement finish. T. C. partitions to 5″ x 12″ unglazed T. C. in a range of light buff, laid up with 1/4″ joints. Exterior and other partition walls to be faced with 2″ T. C. same finish. Free standing columns to have 1/8″ guard, 4′6″ high, corners of columns chamfered above guard. Acoustical tile applied directly to ceiling slab. Combination metal buck, jamb & trim.
No. 2A. Same as finish No. 2, except ceiling slab to be painted.
No. 2B. Same as finish No. 2, except that for a height of 5′0″ the T. C. Units shall have a glazed finish, in color slightly darker than units above.

On the drawing 2–228, within a box describing finishes 2, 2–A, 2–B, is illustrated a detail of the required column guard 4′6″ high and a detailed plan showing the thickness and shape of the guard.

7. Other contract drawings designated as detailed drawings to wit, numbers 2–9, 2–11, 2–12, 2–13, 2–14, 2–15, and

2–17, show portions of the building in more detail and on a larger scale. The scale of these drawings is 1/4 inch to a foot or larger and they relate to the loading platform, truck driveway entrance, lumber storage room, machine shop, and electrolytic plating room on the fourth floor, proving room on the sixth floor, toilets and locker rooms on various floors.

8. These detail drawings supplement and with more definition illustrate particular features of the building. The detailed drawings, however, do not invariably indicate the type of finish to be used in the area illustrated. See detailed drawings 2–11, 2–13, 2–14, 2–15, and 2–17. On some of the illustrations of the detailed drawings, the requirement for column guards is indicated by double lines drawn around some of the columns. In other detail drawings, such indications are lacking.

9. A column guard, sometimes called a casing or jacket, as called for by the contract here in question, is made of steel and is placed around a cement column to protect the column from wear and tear. It encloses the column on all sides, and is particularly used where traffic is encountered.

10. Referring to a small scale 1/16-inch drawing of the floor plans, Nos. 2–1 to 2–10, a total of 582 columns is indicated. In the detailed drawings, Nos. 2–11, 2–12, 2–13, 2–14, 2–15, and 2–17 drawn to the scale of 1/4 inch to a foot or larger, only forty-four standing columns are shown.

11. The plaintiffs on July 8, 1936, entered into a subcontract with the Potts Manufacturing Company of Mechanicsburg, Pennsylvania, to provide all materials and appliances and perform all of the labor required to furnish, deliver, and install miscellaneous and ornamental steel and iron under section 17 of the specifications for the Bureau of Engraving and Printing building as shown on the plans and required by the specifications. This contract called for the installation of steel guards or casings around all free-standing columns contemplated by the contract between the plaintiffs and the United States. The contract, plaintiffs' exhibit No. 4, is by reference made a part of this finding.

12. When the estimate for bid was prepared by the Potts Manufacturing Company all the drawings of the floor plans of the building, i. e., the 1/16-inch drawings, the finish

schedule No. 2–228 and the 1/4-inch and larger detail drawings were available and in hand.

However, because of the presence of the detail drawings the estimator considered only the number of steel guards shown thereon to be the number required of free-standing columns, in the building. Whenever a guard or steel casing was indicated on the detail drawings either by a double line around the column or by a note, such guard was included in the bid. In the absence of such lines or notes on the drawings, guards were not included in the bid.

13. Plaintiff's position is that the detail drawings supersede and override the showing of the small scale floor plan drawings and therefore the schedule of finishes referred to on the small scale drawings is not applicable to or controlling on the question of the number of column casings required.

The Government resists this view and maintains that with the small-scale drawings and the notes thereon direcing a particular finish, and with the finish schedule drawing No. 2–228, together with the detail drawings, that the number and position of column guards or casings is definitely set forth.

14. The parties agree that the Hand Book of Architectural Practice published by the American Institute of Architects, Inc., is a standard and authoritative work on architectural practices.

In this work in the Chapter on Working Drawings is the following:

> Schedules which are in a sense of the nature of drawings and specifications may frequently be of value in presenting certain subjects more clearly than do drawings and specifications alone. Such schedules may be applied to many subjects, as: brick courses; lintels and arches; columns and footings; doors, trims, and frames; room finishes; wall finishes; floor surfaces; hardware; master keys; plumbing fixtures; minor bathroom fittings; lighting fixtures; culinary apparatus and its connections; laboratory equipment and connections. As a simple example of such a schedule, see Exhibit No. 17.
>
> The use of such schedules necessitates extreme care in the avoidance of any indications in the drawings or specifications at variance with the schedule. In other words, if a given subject is to be fully treated in a schedule, it is wise to avoid its treatment in the draw-

ings and specifications other than by mere reference to the schedule.

15. The established practice in the architectural profession is that detail drawings, usually on a larger scale than general plan drawings, more clearly illustrate and define particular portions of the plans. They supplement and are intended to furnish further information in connection with smaller scale or general plan drawings.

16. The estimator for the Potts Manufacturing Company in taking off the quantities on detail drawing No. 2–15, noticed a note calling for a slate wainscot 4 feet 6 inches in height and 1 inch thick with lead arrows pointing to standing columns in the electrolytic plating room. These columns had lines drawn around them designating them as being protected by steel guards. Under the title to the room on this drawing was the notation "Fin. No. 2A," which by the finish schedule drawing 2–228 called for steel guards around the columns. The estimator did not include steel guards in his estimate because of the conflict between the finish note on schedule 2–228 and the note on the detail drawing.

Again in the lumber storage room, detail drawing No. 2–14, the notation "1/8 inch steel jackets, two stories high, to underside of beam" was in conflict with note "Finish No. 1" appearing in the same area on the small scale drawing No. 2–1A. These were the only discrepancies between the detail and small scale drawings. Plaintiffs were paid the difference in the cost of the slate and the steel column guards.

17. Sometime during August or September of 1936, plaintiffs' superintendent, Mr. Houck, and Mr. Paul, representing the Potts Manufacturing Company, called at the Procurement Division and discussed with Mr. Grubb, an engineer in the Federal Works Agency who had charge of the administration of contracts, the question of where column casings were required. He informed them that the casings were required as indicated by the reference in the finish schedule. Plaintiffs' superintendent, Mr. Houck, was not satisfied with this statement and was advised to put his objections in writing.

18. On October 13, 1936, plaintiff addressed a letter to the "Construction Engineer, Public Works Branch, Procurement Division, Treasury Department, Washington, D. C.," stating its position with respect to the discrepancies in the drawings and stating:

> It is pointed out that the only place that column casings on free-standing columns are called for in general is in the finish schedule, and that the various sections indicate where free-standing columns [with casings] are desired or required. We, therefore, feel that, since the casings on free-standing columns are shown in specific instances, the note on the finish schedules is stereotype and does not apply in this instance.

19. The Construction Engineer, Mr. Davis, forwarded to the Supervising Engineer of the Procurement Division on October 13, 1936, this letter of plaintiffs stating:

> The statement made in his letter that column casings are required by the finish schedule under finishes Nos. 1, 2, 2A, and 2B, is true. It is also true that on certain drawings indicated in his letter, column casings are noted for some of the free-standing columns, and others in the same area are not so noted.
>
> The writer is of the opinion that column casings were intended as named in the finish schedule, and the fact that they are not so indicated on every free-standing column will not excuse the contractor from furnishing them in rooms where the finish is Nos. 1, 2, 2A and 2B.
>
> A ruling upon this question is requested at the first possible moment.

20. On October 28, 1936, the Supervising Engineer informed the Construction Engineer by letter that:

> Your interpretation is correct that all column casings should be provided as called for by the finish notes. In case of conflict between these finish notes and notes on the plans for the electrolytic plating room, slate as called for on the plans should be provided instead of steel as required by the finish notes, as the acid used in this room would soon eat out the steel casing if provided.

By direction of the Contracting Officer the Supervising Engineer was charged with the construction, extension, remodeling, and repair of federal construction projects; signing all correspondence necessary to carry out the duties of

his office which did not involve departmental policy or authorization for expenditures; and the performance of the duties of the Assistant Director in the absence of that official. (See Commissioner's Ex. A, filed herein, June 9, 1941, and made a part hereof by reference.)

21. On October 30, 1936, the Construction Engineer wrote to plaintiffs:

> I am directed by the Procurement Division to inform you that all column casings should be provided as called for by the finish notes. In the case of conflict between these finish notes and the notes on the plans for the electrolytic plating room, you are requested to forward to this office a proposal, in quadruplicate, for providing the slate called for on the plans, in lieu of the steel as required by the finish notes.

Later on November 21, 1936, plaintiffs by letter advised the Construction Engineer that they did not concur with the interpretation of the drawings and specifications as set forth in his letter of October 30, 1936, but would forward an estimate of the cost and expenses required by this interpretation.

22. On November 23, 1936, the Construction Engineer forwarded plaintiffs' letter of November 21, 1936, to the Supervising Engineer who on November 30, 1936, advised plaintiffs by letter:

> The installation of column casings as required by the finish schedule is considered to be a contract requirement.
>
> You are requested to forward your proposal as requested for providing slate for the electrolytic plating room in lieu of the steel required by these finish notes.

23. Plaintiffs took no further action on the ruling of the Supervising Engineer until April 9, 1938, when they wrote the Supervising Engineer enclosing a letter dated July 13, 1937, from the subcontractor, Potts Manufacturing Company, which contained a further statement of reasons for disagreement with the Supervising Engineer's decision of November 30, 1936.

The plaintiffs in their letter of transmittal stated:

> We request that the Department's ruling be reconsidered and that we be compensated for the extra work.

24. The Supervising Engineer did reconsider the question and on June 24, 1938, advised the plaintiffs as follows:

> Reference is made to your letter of April 9 and to previous correspondence pertaining to steel casings of columns required in connection with your contract for the Bureau of Engraving and Printing Annex and Economics Building.
>
> In accordance with your request, complete examination of the drawings and specifications has been made, and it is the official interpretation of this Division that column casings are required on all free standing columns in spaces where finishes 1, 2, 2A, and/or 2B occur.
>
> Your request for additional payment for this work therefore is rejected.
>
> Very truly yours,
>
> NEAL A. MELICK,
> *Supervising Engineer.*

25. The subcontractor, Potts Manufacturing Company, was required by the plaintiffs to install 532 steel column casings in addition to the 44 included in their original bid, in accordance with the decision of the Supervising Engineer. The subcontractor has never been paid by plaintiffs for the 532 steel guards.

26. Plaintiffs made no requests and addressed no communication to the Contracting Officer as such or his duly authorized representative for an interpretation of the requirements of the contract drawings. All requests for instructions and interpretation of the drawings were directed to the Construction Engineer or the Supervising Engineer of the Procurement Division.

27. No decision was ever made by Admiral Peoples, the contracting officer, or his authorized representative, W. E. Reynolds, Assistant Director of Procurement, on the interpretation of the contract drawings.

28. The Government made certain changes in the work during its construction which required 104 steel casings of the same type and style as those herein considered.

These additional steel casings were paid for by the defendant at $33.30 apiece including an allowance of 5 percent for profit and 10 percent for overhead. Plaintiff received payment for the 104 steel casings and their cost is not in-

cluded in this suit. At the rate of $33.30 per casing the cost of 532 casings is $17,915.40.

29. Plaintiffs' final voucher forwarded to the Procurement Division on June 6, 1939, for $58,301.31, reserved the present claim from the final settlement, at the request of the subcontractor, Potts Manufacturing Company.

The court decided that the plaintiffs were not entitled to recover.

Jones, *Judge*, delivered the opinion of the court:

Plaintiffs seek to recover the cost of furnishing and installing 532 steel column casings or guards which they claim were not required by the terms of their contract for the construction of a Government building.

The contract, dated June 5, 1936, called for the construction of two buildings, one for the Bureau of Engraving and Printing, and one for the Department of Agriculture. Plaintiffs were to furnish all materials and labor and perform all necessary work. The contract price was $4,657,300. Drawings and specifications were made a part of the contract.

Plaintiffs on July 8, 1936, entered into a subcontract with the Potts Manufacturing Company by the terms of which the latter agreed to furnish all materials and appliances and perform all labor necessary to furnish and install steel and iron required by section 17 of the specifications for the Bureau of Engraving and Printing building and as shown on the plans therefor. The subcontract called for the installation of steel guards or casings around all free-standing columns contemplated by the construction contract between plaintiffs and defendant.

In the small-scale drawings 576 free-standing columns are indicated. In the detail drawings only 44 such columns are shown.

A column guard or casing, according to the contract, was a jacket placed around a column to protect it from injury.

When the subcontractor prepared its estimate for bidding all the drawings and schedules were available and in hand. It claimed that it should have been required to construct only the column guards or casings shown on the detail drawings,

whereas the defendant required that the number indicated in the small scale drawings be constructed. Since the scope of the subcontractor's obligation covered the undertaking of the principal contractor on the particular items, that obligation in so far as it is in issue here, must be measured by the terms of the original contract.

Did the contract (including the drawings, schedules, and specifications) call for the furnishing of the 532 casings?

In the facts of this case we find that it did.

Article 2 of the contract contains this provision:

> ARTICLE 2. *Specifications and drawings.*—* * * Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both.

Section 1–36 of the specifications is as follows:

> This specification is intended to supplement the drawings and, therefore, it will not be its province to mention any portion of the construction which the drawings are competent to explain, and such omission shall not relieve the contractor from carrying out such portions indicated only on the drawings, and should items required by the specification not indicated on the drawings they shall be supplied even if of such nature that they could have been indicated thereon.

Section 17–2 of the specifications provides:

> Details cited under this heading are referred to only as illustrative of the character of the work required and are not assumed to show the extent of the work specified or shown on drawings not mentioned by number.

Detail drawings usually on a larger scale than the small-scale drawings are frequently used to more clearly illustrate particular portions of the work to be done. That was true here.

The subcontractor was required by the plaintiffs to install 532 steel column casings, in accordance with the decision of the supervising engineer, in addition to the 44 which it had contemplated in submitting its bid. The plaintiffs have not paid the subcontractor any additional amount for the 532 casings.

However regardless of the rights as between the subcontractor and the contractor, a proper analysis of the plaintiffs'

contract with the Government shows an obligation on their part to install or have installed the 532 casings.

The small-scale drawings were part and parcel of their contract. When read in connection with the finish schedules they show clearly that the controverted casings were included. In the light of the provisions of the contract and specifications, plaintiffs could not ignore their obligation to install the casings in controversy.

To permit recovery it would be necessary for us to read out of the contract the small-scale drawings and schedules which purported to be complete, and which were specifically a part of the contract, and to read into the contract as exclusive the detail drawings as superseding them. We know of no authority which justifies such an interpretation. They were all a part of the contract. When the two are examined together it becomes manifest that the detail drawings were intended to illustrate portions of the work on a larger scale. We cannot justify anyone undertaking the work in failing, whether by oversight or otherwise, to consider the small-scale drawings and finish schedules along with other provisions of the contract.

There were two small discrepancies between the detail and the small-scale drawings. The detail drawing called for slate instead of steel in the electrolytic plating room and for higher casings in the lumber room. Slate was used in the electrolytic plating room because of the tendency of acid to corrode and destroy the steel. The higher jackets were used in the lumber room because of the added danger of injury to the columns. These conflicts were adjusted and plaintiffs were paid for the difference in the materials thus used.

Plaintiffs insist that because the materials called for in the large-scale drawings were used it is thus shown that the large scale drawings superseded the small-scale drawings and finish schedules. This position is untenable. Far from showing such a substitution, the fact that plaintiff was paid an additional amount for such changes is evidence that the large-scale drawings did not govern to the exclusion of the other drawings and schedules. If the plaintiffs' contention were correct that they were authorized to rely wholly on the large-scale drawings, they would not have been entitled to extra pay for the use of materials shown on such drawings.

The defendant made certain changes in the work during construction which required 104 steel casings of the same type as those under consideration. Plaintiffs received payment for these under a change agreement and they are not in issue.

Defendant urges that because of the position and authority of the Supervising Engineer, as set out in finding 20, his decision was final in the absence of a showing that it was arbitrary or capricious. However, in view of what has been said it is not necessary to inquire into the question of whether the Supervising Engineer had authority to interpret the provisions of the contract or whether his interpretation was final.

In accepting final voucher for contract payment plaintiffs, at the request of the subcontractor, reserved the present claim from final settlement.

Plaintiffs are not entitled to recover and the petition is dismissed.

Madden, *Judge;* Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

WILLIAM BADDERS v. THE UNITED STATES

[No. 45213. Decided December 7, 1942]

On the Proofs

Pay and allowances; $100 gratuity under the Act of March 3, 1901; Congressional Medal of Honor to enlisted men in Navy.—Where plaintiff, a chief machinist mate, U. S. Navy, was on January 6, 1940, awarded by the President of the United States the Congressional Medal of Honor for "service during the rescue and salvage operations of the U. S. S. Squalus," on May 23, 1939, in time of peace; and where plaintiff received the pay increase of $2 per month in accordance with section 4 of the Act of February 4, 1919, providing such increase for enlisted recipients of the Congressional Medal of Honor; and where plaintiff has not received the $100 gratuity provided by the Act of March 3, 1901, for any enlisted man in the Navy receiving the Congressional Medal of Honor; it is *held* that plaintiff was awarded the said Congressional Medal of Honor under the provisions of the Act of March 3, 1901, and that plaintiff is entitled to receive also the $100 gratuity provided by said act.

Same; Act of March 3, 1901, not repealed by Act of February 4, 1919.—The Act of March 3, 1901, 31 Stat. 1099, was not repealed by the Act of February 4, 1919, 40 Stat. 1056 (U. S. Code, Title 34, sections 351, 354–364).

Same; repeals by implication.—Repeals by implication are not found unless the acts in question are repugnant. *United States* v. *Borden Company*, 308 U. S. 188, 198.

Same; deeds of heroism in time of peace.—Where the 1919 Act made provision, in its section one for awards of the Congressional Medal of Honor for acts of heroism performed in battle and in sections 2 and 3 for awards, but not in the name of Congress, for acts of heroism not performed in battle; it is *held* that while plaintiff could not have been awarded the Congressional Medal of Honor under the 1919 Act for his deed of heroism not performed "in action involving actual conflict with the enemy," it is not necessarily implied that plaintiff could not receive a Medal of Honor under another act.

Same; classification of awards in 1919 Act not exclusive.—In the 1919 Act Congress did not provide that the classification of awards set up in said act should be the only classification; legislative history of the enactment indicates that Congress did not intend to go so far.

The Reporter's statement of the case:

King & King for the plaintiff. *Mr. Fred W. Shields* was on the brief.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Miss Stella Akin* and *Mr. S. R. Gamer* were on the brief.

The court made special findings of fact as follows:

1. On January 6, 1940, the following communication was addressed to plaintiff by the President of the United States:

> Sir:
>
> The President of the United States takes pleasure in presenting the Congressional MEDAL OF HONOR to
>
> WILLIAM BADDERS, Chief Machinist's Mate, U. S. Navy, for service during the rescue and salvage operations of the U. S. S. SQUALUS as set forth in the following
>
> CITATION:
>
> For extraordinary heroism in the line of his profession during the rescue and salvage operations following the sinking of the U. S. S. SQUALUS

on 23 May 1939. During the rescue operations BADDERS, as Senior Member of the rescue chamber crew, made the last extremely hazardous trip of the rescue chamber to attempt to rescue any possible survivors in the flooded after portion of the SQUALUS. He was fully aware of the great danger involved in that if he and his assistant became incapacitated, there was no way in which either could be rescued. During the salvage operations BADDERS made important and difficult dives under the most hazardous conditions. His outstanding performance of duty contributed much to the success of the operations and characterizes conduct far above and beyond the ordinary call of duty.

FRANKLIN D. ROOSEVELT.

2. The medal was presented to plaintiff by Honorable Charles Edison, Secretary of the Navy, at the Navy Department, January 19, 1940.

3. By reason of such award plaintiff was credited with additional pay at the rate of $2.00 per month, a total of $19.33, from May 23, 1939, to March 2, 1940.

4. During all periods of time hereinabove mentioned, plaintiff was a Chief Machinist's Mate, U. S. Navy.

5. Plaintiff was transferred to Fleet Reserve Class F-4-D on March 12, 1940. Since March 13, 1940, the retainer pay of the plaintiff includes an increase of ten percent or $9.45 per month by reason of extraordinary heroism in line of duty.

6. Plaintiff has not been paid a hundred-dollar gratuity in connection with the above stated award of a medal.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

On January 6, 1940, the President of the United States addressed to plaintiff the communication which appears in No. 1 of the Special Findings of Fact. Plaintiff claims that under the applicable statute a gratuity of $100 should have been paid him after he was awarded the medal mentioned in the President's communication. The gratuity was not paid, and plaintiff here sues for it.

Plaintiff says that the Medal of Honor was awarded to him pursuant to the terms of the Act of March 3, 1901,

which act specifically provides for a $100 gratuity. The money has not been paid because the Comptroller of the Treasury in 1919 (27 Comp. Dec. 297) and the Comptroller General in two decisions since that time (1 Comp. Gen. 240; 5 Comp. Gen. 258) have held that a 1919 statute (Chap. 14, 40 Stat. 1056, U. S. C. A., Tit. 34, Secs. 356–364) repealed the Act of 1901 and set up a new and different system of rewards for heroism in the Navy, under which system the President could not confer the Congressional Medal of Honor for peacetime heroism, but only a Distinguished Service Medal or a Navy Cross.

It is necessary to set out the pertinent statutory provisions.

Section 1407 of the Revised Statutes (derived from Act of May 17, 1864, 13 Stat. 79) provides:

> Seamen distinguishing themselves in battle, or by extraordinary heroism in the line of their profession, may be promoted to forward warrant officers, upon the recommendation of their commanding officer, approved by the flag officer and Secretary of the Navy. And upon such recommendation they shall receive a gratuity of $100 and a medal of honor, to be prepared under the direction of the Navy Department.

Chapter 850 of the Act of March 3, 1901 (Chap. 50, 31 Stat. 1099, U. S. C. A., Tite 34, Section 351), provides:

> An Act for the reward of enlisted men of the Navy or Marine Corps.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any enlisted man of the Navy or Marine Corps who shall have distinguished himself in battle or displayed extraordinary heroism in the line of his profession shall, upon the recommendation of his commanding officer, approved by the flag officer and the Secretary of the Navy, receive a gratuity and medal of honor as provided for seamen in section fourteen hundred and seven of the Revised Statutes.

The Act of February 4, 1919 (Chap. 14, 40 Stat. 1056, U. S. C. A., Title 34, Section 354–364), provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be, and he is hereby, authorized to present, in the name of Congress, a medal of honor to any person

who, while in the naval service of the United States, shall, in action involving actual conflict with the enemy, distinguish himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty and without detriment to the mission of his command or the command to which attached.

SEC. 2. That the President be, and he hereby is, further authorized to present, but not in the name of Congress, a distinguished-service medal of appropriate design and a ribbon, together with a rosette or other device to be worn in lieu thereof, to any person who, while in the naval service of the United States, since the sixth day of April, nineteen hundred and seventeen, has distinguished, or who hereafter shall distinguish, himself by exceptionally meritorious service to the Government in a duty of great responsibility.

SEC. 3. That the President be, and he hereby is, further authorized to present, but not in the name of Congress, a Navy cross of appropriate design and a ribbon, together with a rosette or other device to be worn in lieu thereof, to any person who, while in the naval service of the United States, since the sixth day of April, nineteen hundred and seventeen, has distinguished, or who shall hereafter distinguish, himself by extraordinary heroism or distinguished service in the line of his profession, such heroism or service not being sufficient to justify the award of a medal of honor or a distinguished-service medal.

SEC. 4. That each enlisted or enrolled person of the naval service to whom is awarded a medal of honor, distinguished-service medal, or a Navy cross shall, for each such award, be entitled to additional pay at the rate of $2 per month from the date of the distinguished act or service on which the award is based, and each bar, or other suitable emblem or insignia, in lieu of a medal of honor, distinguished-service medal, or Navy cross, as hereinafter provided for, shall entitle him to further additional pay at the rate of $2 per month from the date of the distinguished act or service for which the bar is awarded, and such additional pay shall continue throughout his active service, whether such service shall or shall not be continuous.

SEC. 5. That no more than one medal of honor or one distinguished-service medal or one Navy cross shall be issued to any one person; but for each succeeding deed or service sufficient to justify the award of a medal of honor or a distinguished-service medal

or Navy cross, respectively, the President may award a suitable bar, or other suitable emblem or insignia, to be worn with the decoration and the corresponding rosette or other device.

SEC. 6. That the Secretary of the Navy is hereby authorized to expend from the appropriation "Pay of the Navy" of the Navy Department so much as may be necessary to defray the cost of the medals of honor, distinguished-service medals, and Navy crosses, and bars, emblems, or insignia herein provided for, and so much as may be necessary to replace any medals, crosses, bars, emblems, or insignia as are herein or may heretofore have been provided for: *Provided*, That such replacement shall be made only in those cases where the medal of honor, distinguished-service medal, or Navy cross, or bar, emblem, or insignia presented under the provisions of this or any other Act shall have been lost, destroyed, or rendered unfit for use without fault or neglect on the part of the person to whom it was awarded, and shall be made without charge therefor.

SEC. 7. That, except as otherwise prescribed herein, no medal of honor, distinguished-service medal, Navy cross, or bar or other suitable emblem or insignia in lieu of either of said medals or of said cross, shall be issued to any person after more than five years from the date of the act or service justifying the award thereof, nor unless a specific statement or report distinctly setting forth the act or distinguished service and suggesting or recommending official recognition thereof shall have been made by his naval superior through official channels at the time of the act or service or within three years thereafter.

SEC. 8. That in case an individual who shall distinguish himself dies before the making of the award to which he may be entitled, the award may nevertheless be made and the medal or cross or the bar or other emblem or insignia presented within five years from the date of the act or service justifying the award thereof to such representative of the deceased as the President may designate: *Provided*, That no medal or cross or no bar or other emblem or insignia shall be awarded or presented to any individual or to the representative of any individual whose entire service subsequent to the time he distinguished himself shall not have been honorable: *Provided further*, That in cases of persons now in the naval service for whom the award of the medal of honor has been recommended in full compliance with then existing regula-

> tions, but on account of services which, though insufficient fully to justify the award of the medal of honor, appear to have been such as to justify the award of the distinguished-service medal or Navy cross hereinbefore provided for, such cases may be considered and acted upon under the provisions of this Act authorizing the award of the distinguished-service medal and Navy cross notwithstanding that said services may have been rendered more than five years before said cases shall have been considered as authorized by this proviso, but all consideration or any action upon any of said cases shall be based exclusively upon official records now on file in the Navy Department.
>
> SEC. 9. That the President be, and he hereby is, authorized to delegate, under such conditions, regulations, and limitations as he shall prescribe, to flag officers who are commanders in chief or commanding on important independent duty the power conferred upon him by this Act to award the Navy cross; and he is further authorized to make from time to time any and all rules, regulations, and orders which he shall deem necessary to carry into effect the provisions of this Act and to execute the full purpose and intention thereof.

As we have said, from the time of the adoption of the 1919 Act, the Comptroller of the Treasury and, since the office of the Comptroller General was established, that official, have consistently held that the Act of 1901 was repealed by the Act of 1919. On the other hand, the Judge Advocate General of the Navy held that the Act of 1901 was still in force (see 1 Comp. Gen. 240), and the Navy Department has continued to award Medals of Honor under the 1901 Act (see Par. A–1002 of the Bureau of Navigation Manual). Several Presidents have since 1919 made some twenty awards of Congressional Medals of Honor for peacetime heroism. The consequence has been that these persons have received their Congressional Medals of Honor but not their $100 gratuities. Somewhat surprisingly plaintiff received, without objection by the Comptroller General, the pay increase of $2 per month provided by Section 4 of the 1919 Act. This seems hardly consistent with that official's decision that the 1901 Act was repealed in 1919, since if plaintiff's Congressional Medal was not awarded under the 1901 Act it could not have been lawfully awarded at all, as

the 1919 Act plainly provides for the Congressional Medal for wartime heroes only.

The defendant's attorneys indicate that they think plaintiff is entitled to the gratuity, and, after pointing out the arguments for and against that position, they submit the problem to the Court.

We think that the Act of 1919 did not repeal the Act of 1901. There is no express language of repeal in the later Act. Repeals by implication are not found unless the acts in question are repugnant. *U. S.* v. *Borden Co.*, 308 U. S. 188, 198. Here there is no necessary repugnancy. The 1919 Act made provision, in its Sections 2 and 3, for awards for such acts as plaintiff's, not performed in battle. Under this Act he could possibly have been given a Distinguished Service Medal or certainly a Navy Cross. But the Congressional Medal of Honor, provided for in Section 1 of the 1919 Act, was reserved for acts of heroism "in action involving actual conflict with the enemy," hence plaintiff could not have been awarded that honor under that act. But that does not necessarily imply that plaintiff was not to be permitted to receive a Medal of Honor under another act.

Congress might very logically have provided that the classification of awards set up in the 1919 Act should be the only one available. The legislative history indicates that Congress did not intend to go so far. A provision in the bill as reported to the House provided for the repeal of all other acts relating to awards of Medals of Honor. That provision was deleted by amendment on the floor. The House debate (56 Cong. Rec., pp. 11139–40) indicates some confusion as to what the then-existing law was, but no sufficiently clear intention to repeal earlier laws. In the Senate, the Committee Report stated:

> This bill does not repeal nor is it intended to repeal any existing statute. It does, however, amplify the existing statutes respecting the medal of honor, which is now oftentimes referred to as the congressional medal of honor (Senate Report No. 638, 65th Cong., 3rd Sess.).

Nothing else in the Senate proceedings contradicts this express statement. We conclude, therefore, that the Act of

1901 is still in force, that plaintiff received his award under it, and that he is entitled to the $100 gratuity provided for in that Act. It is so ordered.

JONES, *Judge;* WHITTAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

ROY M. JONES v. THE UNITED STATES

[No. 45404. Decided December 7, 1942]

On the Proofs

Pay and allowances; "flying officer."—Observer not "qualified as a pilot" within the meaning of the act of July 2, 1926 (44 Stat. 780, 781) following the decision in *Schofield* v. *United States*, *ante*, p. 263.

The Reporter's statement of the case:

Mr. M. C. Masterson for the plaintiff. *Messrs. Ansell, Ansell & Marshall* were on the briefs.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Roy M. Jones, was appointed Second Lieutenant of Infantry November 30, 1912, and accepted the appointment on December 4, 1912. He was promoted to First Lieutenant July 1, 1916, and to Captain May 15, 1917. On October 2, 1917, he accepted appointment of September 29, 1917, as Major (temporary) in the Signal Corps; and on August 21, 1918, accepted appointment of August 14, 1918, as Lieutenant Colonel, Air Service, U. S. Army. He was honorably discharged on March 15, 1920, reverting to the grade of Captain, Regular Army, and promoted to Major July 1, 1920. On August 9, 1920, he was detailed to the Air Service, and transferred thereto on June 16, 1921. On August 1, 1935, he was promoted to Lieutenant Colonel, and on December 1, 1937, to Colonel (temporary), and accepted the same on that date.

Plaintiff's active commissioned service has been continuous from December 4, 1912, to the present date.

2. In October 1920 the plaintiff reported at the Army Balloon School at Fort Omaha, Nebraska, to take "balloon" training. The course included flights in free balloons. The requirement for a free balloon pilot was a minimum of five flights of not less than one hour's duration, one of which had to be a night flight of not less than four hours' duration, after which it was necessary to solo a balloon for not less than one hour. The plaintiff qualified as a free balloon pilot and was given a certificate as such by the Federation Internationale Aeronautique of France, an international association. At that time there was no War Department rating of "balloon pilot."

3. After having completed the necessary courses, including free balloon piloting, and satisfactorily passing the required tests, the plaintiff, then a Major (by Personnel Orders No. 71, War Department, dated March 29, 1921), was given a rating of "balloon observer." The pertinent part of these orders reads as follows:

> 5. Major Roy M. Jones, Air Service, having completed the required tests, is, under the provisions of Paragraph 1584½, Army Regulations, rated as Balloon Observer, effective this date.

Plaintiff's rating as a balloon observer has never been revoked and is therefore still in effect.

4. On December 6, 1922, Personnel Orders No. 248 were issued, section 1 of which related to plaintiff and is as follows:

> 1. Pursuant to Section 2, General Order No. 46, War Department, 1922, as published in Executive Order of October 30, 1922, amending Executive Order of July 1, 1922, as published in General Order No. 30, War Department, 1922, the detail to duty involving flying, effective November 10, 1922, of the following named officers commissioned in, or detailed to the Air Service, who are fit for duty involving flying, and who were on duty requiring regular and frequent participation in aerial flights on June 30, 1922, and have been on such duty since that date, is hereby confirmed, an emergency having existed that prevented the issuance of this order on that date. All orders issued in conflict with above are hereby revoked.
>
> The detail to duty involving flying constitutes participation in one or more of the following: Routine test

> flights and test flights of new or overhauled aircraft or their power plants, instruments, equipment, or accessories; prescribed training of student airplane pilots, student observers, or members of aircraft crews; inspection of the adequacy of flight training material; the efficiency of instructing personnel; familiarizing pilots or other flying personnel with the operation of types of aircraft, power plants, instruments, or equipment with which they are inexperienced; experimental development of aircraft or parts of aircraft or for experimental development of aviation instruments, equipment, or accessories, training for aircraft gunnery and bombing exercises; administrative or inspection purposes in connection with air work or for expediting the movements of personnel, material or mail; training of reserve flying personnel flights duly authorized for the purpose of cooperation with other Government Departments, ferrying aircraft, aerial scouting, reconnaissance, convoy, patrol flights, or training for the performance of any of these duties; aerial photography, mapping, pigeon training; tactical maneuvers and for the study and observation of the physical and psychological condition of flying personnel.
>
> * * * * *
>
> Major ROY M. JONES, A. S.
>
> * * * * *
>
> By order of the Chief of Air Service:
>
> W. H. FRANK, *Executive*.

5. In 1924 plaintiff was sent to Kelly Field, Texas, to take the advanced observation course, from which he graduated in March 1925, receiving a rating there of airplane observer.

War Department orders issued April 9, 1925, paragraph 6 of which related to plaintiff, read as follows:

> Major Roy M. Jones, Air Service, having satisfactorily completed the required course in Observation at the Advanced Flying School, is, under the provisions of Section 8, General Orders 55, War Department, 1922, rated Airplane Observer, effective March 23, 1925.

Plaintiff never received the War Department rating of aircraft pilot.

6. During the period of plaintiff's claim, that is from March 1, 1935 to October 21, 1938, inclusive, he was on duty requiring him to participate regularly and frequently in aerial flights, and by orders of competent authority per-

formed the flights prescribed in Executive Order of June 27, 1932, and fulfilled the legal requirements entitling him to draw flying pay for that period, during which he flew as an airplane observer.

7. From March 1, 1935 to October 31, 1938, plaintiff was paid, in addition to his base and longevity pay, flying pay at the rate of $120 a month, or $1,440 a year, reduced by the provisions of the Economy Act when applicable.

From March 1, 1935 to October 31, 1938, he was refused flying pay at the rate of 50 percent of his base and longevity pay on the ground that he was not considered a flying officer.

8. If plaintiff is entitled to flying pay at the rate of 50 percent of his base and longevity pay from March 1, 1935 to October 31, 1938, there is due him the sum of $3,381.70 as computed by the General Accounting Office.

The court decided that the plaintiff was not entitled to recover in an opinion *per curiam*, as follows:

Plaintiff's petition is dismissed on the authority of *Earl S. Schofield* v. *United States*, No. 45293, decided by this court on October 5, 1942, *ante*, p. 263. It is so ordered.

LYNCHBURG COAL AND COKE COMPANY v. THE UNITED STATES

[No. 45501. Decided December 7, 1942]

On the Proofs

Income tax; deduction for depletion; coal lands mined under lease; recoupment.—Where plaintiff, a corporation lessee of coal lands from which it mined coal, paying to the lessor a royalty per ton of coal mined, was under the Treasury Regulations then in force not permitted to deduct from its income for tax purposes for the years 1913–1917, inclusive, depletion resulting from its removal of coal; and where during the years 1918–1933, inclusive, the Commissioner of Internal Revenue in applying the formula for allowable depletion under the applicable statutes treated as if it were still in place the coal actually mined by plaintiff in 1913–1917, inclusive, but for which no depletion allowance had been made; and where in 1934 and in 1935 the Commissioner changed his practice with reference to plaintiff's operation and reduced the value of the intact

coal, which had up until that time been annually reduced by the value of the number of tons taken out in each of the years 1918–1933, inclusive, by the additional amount representing the value of the number of tons mined in the years 1913–1917, inclusive, thus decreasing the depletion unit per ton and increasing the tax due by plaintiff; it is *held* that plaintiff is not entitled to recover under the equitable doctrine of recoupment. *Josephine V. Hall v. United States,* 95 C. Cls. 539 cited; *Stone* v. *White,* 301 U. S. 532 distinguished.

Same; erroneously disallowed depletion deducted under 1934 Revenue Act.—Under the provisions of the 1934 Revenue Act the Commissioner was required to make deductions for depletion previously allowed but not less than the amount allowable under prior income tax laws; and since the 1913–1917 erroneously disallowed depletion was allowable, the Commissioner was required to deduct it.

Same; statute of limitation.—Plaintiff's right to sue directly for a refund of the 1913–1917 taxes is long since barred by the statute of limitation.

Same; Commissioner's refusal under 1928 Revenue Act to credit overpayments.—The Commissioner's refusal to credit plaintiff in 1934 and 1935 with overpayments made in the years 1913–1917, inclusive, is authorized by sections 608 and 609 of the Revenue Act of 1928.

Same.—The Commissioner's refusal to do an act which the statute expressly declares to be void if he attempts to do it does not lay the Government open to suit because he did not do it.

Same; adjustments for years prior to 1932 prohibited by section 820, 1938 Revenue Act.—Where the adjustment involved in plaintiff's claim for refund is really for taxes alleged to have been wrongfully collected in the years 1913–1917, inclusive, rather than for taxes collected in 1934 and 1935; it is *held* that such adjustment is prohibited by subdivision (f) of section 820 of the Revenue Act of 1938, limiting adjustments under section 820 to taxable years subsequent to January 1, 1932.

Same.—Congress could not have intended to mean, in the enactment of section 820 of the 1938 Revenue Act, that any claim, however old, would come within the said statute merely because the later tax against which the older one might be offset was for the year 1932 or later.

The Reporter's statement of the case:

Mr. Dion S. Birney for the plaintiff.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.,* for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff was organized as a corporation under the laws of the State of West Virginia in the year 1890 and maintained its corporate existence and full corporate powers continuously from that date and during all times material hereto and until the ninth day of November 1940, when its formal dissolution as a corporation was completed and a certificate thereof issued by the Secretary of State of said State of West Virginia. Plaintiff's principal office was at Kyle, West Virginia, and its books were and are now kept at 1309 Allied Arts Building, Lynchburg, Virginia.

2. Upon its incorporation in 1890, plaintiff entered into a certain lease agreement with Samuel A. Crozer, of Upland, Delaware County, Pennsylvania, the fee owner of the certain 933 acres, more or less, of lands located in McDowell County, West Virginia, more particularly described in said lease, under the terms of which, among other things, plaintiff as lessee became exclusively entitled to develop said lands for the production of coal and to mine and sell coal from said lands or to coke such coal and sell the same as coke upon payment as rental by it to said owners of a royalty of ten cents for each and every ton (of 2,240 pounds) of coal mined, dug, or carried away from, or used or sold on said demised premises for any purpose other than the manufacture of coke for shipment; and fifteen cents per ton for each and every ton (of 2,240 pounds) of coke made upon the said premises. And plaintiff did so develop said lands and continuously thereafter and during all times material hereto and until just prior to its dissolution in 1940 as aforesaid, mined and sold coal from said properties and otherwise exercised its rights and performed its obligations in accordance with the terms of said lease.

3. Plaintiff's leased properties were developed and in full operation on March 1, 1913. On that date plaintiff's development cost was $53,750.00, the amount of recoverable coal in place was 5,200,000 tons, and its then value to plaintiff was $182,229.95.

4. Prior to the final decision on March 2, 1925, of *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, the Bureau of Internal Revenue did not allow any deduction to lessees of mines for depletion of March 1, 1913 value in computing federal

income taxes for the taxable years 1913 to 1917, both inclusive. The Bureau allowed deductions for such depletion only to the owners of fee titles to such mining properties. After that decision the Bureau allowed lessees of mining properties to deduct depletion upon the basis of March 1, 1913 value in computing federal income taxes for the taxable years 1913 to 1917, both inclusive. However, no such deduction was ever allowed to the plaintiff for any of the years 1913 to 1917, inclusive.

5. In the computation of its federal income taxes for the taxable years 1913 to 1933, both inclusive, plaintiff as a lessee was allowed deductions for depletion upon its development cost at March 1, 1913, of $53,750.00 as given above, in amounts shown as follows:

Year	Production	Unit Rate	Depletion
1913	207,912	1c	$2,079.12
1914	193,536	1c	1,935.36
1915	220,632	1c	2,206.32
1916	275,260	1c	2,752.60
1917	236,173	1c	2,361.73
	1,133,513 tons		$11,335.13
1918–1933	2,977,003 tons		$29,770.03
Grand Total	4,110,516 tons		$41,105.16

6. For each of the taxable years 1918 to 1933, both inclusive, plaintiff was allowed deductions taken for additional depletion upon the basis of its March 1, 1913 value of $182,229.95 as aforesaid at a unit rate of 3½ cents per ton for the years 1918 to 1925, inclusive, and at a rate of 3.538 cents for the years 1926 to 1933, inclusive, this difference being brought about by carrying out a computation two additional decimal points. The rate was obtained by a division of 5,200,000 tons of coal into its $182,229.95 value. The total depletion so allowed amounted to $104,772.05. This, plus the depletion allowance of $41,105.16 at the 1-cent unit rate upon development cost mentioned in the preceding paragraph, made a total aggregate depletion allowance to the plaintiff for the years 1913 to 1933, both inclusive, of $145,877.21.

If the plaintiff had been allowed depletion upon its March 1, 1913 value at the unit rate of 3½ cents per ton for the

years 1913 to 1917, inclusive, it would have been entitled to further deductions for depletion, as follows:

Year:	Depletion
1913	$7, 276. 92
1914	6, 773. 76
1915	7, 722. 12
1916	9, 634. 10
1917	8, 266. 06
	$39, 672. 96

7. Plaintiff duly filed its federal corporation income and profits tax return for the calendar year 1934 on March 11, 1935, reporting a total gross income of $135,684.70; deductions therefrom, including a deduction for depletion of $19,795.58, amounting in all to $70,555.50; a net income of $65,129.20; an income tax thereon of $8,609.00; and an excess-profits tax of $1,381.46. The aggregate tax of $9,990.46 was timely assessed and paid in quarterly installments during 1935, as follows:

March 11	$2, 497. 66
June 8	2, 497. 60
September 12	2, 497. 60
December 11	2, 497. 60

These payments are not now in controversy.

The depletion deduction of $19,795.58 mentioned above was calculated upon plaintiff's return, as follows:

Leasehold value 3/1/13	$182, 229. 95	
Development value 3/1/13	53, 750. 00	
		$235, 979. 95
Depletion at 12/31/33		145, 877. 21
Balance 1/1/34		$90, 102. 74
$\frac{90,102.74}{835,727.00}=10.78136$ G. T.		
Production 1934 183,613 G. T. @ 10.78136		$19, 795. 58

8. Plaintiff duly filed its federal corporation income and profits tax return for the calendar year 1935 on March 10, 1936, reporting a total gross income of $118,670.11; deductions therefrom, including a deduction of $18,541.71 for depletion, amounting in all to $65,964.85; a net income of $52,705.26; an income tax of $7,027.73; and an excess profits tax of $911.88. Among other deductions taken upon this return was an

item of $724.07 of federal sales tax. This item will be referred to in a subsequent paragraph. The aggregate tax of $7,939.61 was timely assessed and paid in quarterly installments during 1936 as follows:

March 11	$1,984.91
June 11	1,984.90
September 12	1,984.90
December 7	1,984.90

These payments are not now in controversy.

The deduction of $18,541.71 for depletion mentioned above was calculated as follows:

Leasehold value 3-1-13	$182,229.95
Development value 3-1-13	53,750.00
	$235,979.95
Depletion 1-1-35	165,672.79
	$70,307.16

$70,307.16÷652,114 G. T.=10.78142c per G. T.

Production 1935

171,978.35 G. T. at 10.78142c=$18,541.71

9. During 1934, plaintiff ascertained that the recoverable tons of coal upon its leased premises were in fact less than the estimate thereof which had been previously made and determined that as of January 1, 1934 the recoverable quantity was only 835,727 tons, whereas on the basis of the original estimate of 5,200,000 tons as of March 1, 1913, less 4,110,516 tons removed between March 1, 1913 and December 31, 1933, there would have been 1,089,484 tons recoverable as of January 1, 1934. Plaintiff's 1934 and 1935 federal tax returns, particularly the above-quoted excerpts therefrom showing the calculation of depletion claimed as a deduction thereon, each reflected plaintiff's changed estimate of coal in place as of January 1, 1934. After an investigation, the Commissioner of Internal Revenue acquiesced in and accepted plaintiff's revised estimate of 835,727 tons as the recoverable coal in place on January 1, 1934.

10. After the investigation of plaintiff's adjustment for recoverable coal in place on January 1, 1934, and after acceptance of plaintiff's revised figure of 835,727 tons, as stated in

the preceding paragraph, the Commissioner of Internal Revenue made a further adjustment in calculating plaintiff's unit rate for depletion after January 1, 1934, as follows: Although as stated in paragraphs 4 and 6 above plaintiff had never been allowed depletion upon its March 1, 1913, value at the unit rate of 3½ cents per ton for the years 1913 to 1917, inclusive, in the aggregate amount of $39,672.96, the Commissioner nevertheless considered that the Revenue Act of 1934, particularly the provisions of Section 113 (b) (1) (B) controlled a determination of the depletion allowable to the plaintiff for the years 1934 and 1935 and required an adjustment not only for depletion actually allowed but not less than the amount allowable under prior income-tax laws. He, therefore, considered that even though plaintiff had never been allowed that depletion for the years 1913 to 1917, inclusive, aggregating $39,672.96 as shown in paragraph 6 above, it was nevertheless a proper adjustment required by the applicable statute. That adjustment resulted in a revised depletion unit rate per ton of 6.034 cents, calculated as follows:

Plaintiff's computation in 1934 return:			*Commissioner's computation*
Leasehold value 3/1/13	$182, 229. 95	$182, 229. 95	
Development value 3/1/13	53, 750. 00	53, 750. 00	
Total depletable basis	235, 979. 95	235, 979. 95	$235, 979. 95
Less depletion taken from 3/1/13 to 12/31/33	145, 877. 21	145, 877. 16	
Less depletion allowable from 3/1/13 to 12/31/17	none.	*39, 762. 96	185, 550. 12
Balance remaining 1/1/34	$90, 102. 74		$50, 429. 83

Unit rate $\left\{\frac{\$90,102.74}{835,727 \text{ tons}}\right\}$ =10.78136c

Unit rate $\left\{\frac{\$50,429.83}{835,727 \text{ tons}}\right\}$ =6.034c

*This is the basic figure that is now in dispute.

11. The Commissioner's adjustment for the item of $39,672.96 and his determination of a depletion unit rate of 6.034 cents per ton as of January 1, 1934, plus a disallowance

of the claimed deduction on plaintiff's 1935 return of $724.07 as federal sales tax which plaintiff's refund claim conceded to be a proper adjustment, produced additional and deficiency taxes for the years 1934 and 1935 as follows:

	1934	1935
Income tax	$1,198.50	$1,222.18
Interest	223.10	154.18
Excess profits tax	435.82	202.52
Interest	81.13	25.55
Total	$1,938.55	$1,604.43

Appropriate so-called deficiency letters were duly addressed to the plaintiff by the Commissioner advising of his adjustment calculation and of the asserted deficiencies. Those deficiencies and accrued interest were thereafter timely assessed and paid by the plaintiff to the Collector of Internal Revenue for its district on May 5, 1938.

12. Separate formal claims for refund of the payments of $1,938.55 for 1934, and $1,604.43 for 1935, were filed with the Collector of Internal Revenue on December 9, 1938. Those claims set forth as grounds in substance (a) that the Commissioner erred in adjusting plaintiff's unit rate for depletion by the amount of $39,672.96 representing depletion allowable but never in fact allowed for the years 1913 to 1917, inclusive, and (b) that in the alternative if the adjustment was correct then plaintiff is entitled to recoup overpayments of its taxes for the years 1913 to 1917, inclusive, resulting from the same identical depletion adjustments for the separate years, upon the authority of *Bull* v. *United States*, 295 U. S. 247.

Copies of plaintiff's refund claims appear as Exhibits "A" and "B" to its petition in this suit, except that as shown in the petition they are incomplete in that the certificate of the Notary Public is not shown filled out. It is agreed that both claims as filed were properly subscribed and sworn to on November 7, 1938 before R. M. Younger, a Notary Public in and for Lynchburg, Virginia, and bear his official seal. Its grounds for refund as stated in those claims appear in paragraphs 1 and 2 on pages 19 and 20 of the petition.

Plaintiff's claims for refund were formally rejected by the Commissioner of Internal Revenue upon a schedule dated January 8, 1940, and plaintiff was so advised by registered letters of the same date, as required by law.

13. If the plaintiff was and is entitled to make use of the additional deductions for depletion for the years 1913 to 1917, inclusive, in the aggregate amount of $39,672.96, its federal income taxes for those years have been overpaid in amounts as follows:

For the year 1913	$72.78
For the year 1914	67.74
For the year 1915	77.22
For the year 1916	192.68
For the year 1917	5,158.01
Total	$5,568.43

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff, pursuant to claims for refund timely filed and rejected by the Commissioner of Internal Revenue, sues to recover alleged overpayments of income and excess profits taxes for the years 1934 and 1935 which, plaintiff asserts, were wrongfully collected from it.

Plaintiff's theory as to the asserted excessiveness of the taxes collected from it in 1934 and 1935 is as follows: Plaintiff is, and has been since 1890, the lessee of coal lands in West Virginia from which it mined coal, paying to the lessor a royalty per ton of coal mined. When taxes on incomes began to be levied in 1913, plaintiff, because it was a lessee and not an owner of the coal in place, was not permitted to deduct from its income for tax purposes depletion resulting from its removal of coal. Treasury Regulations No. 33 of January 5, 1914, Art. 145; Treasury Regulations No. 33 (Revised) of January 2, 1918, Art. 171. In 1918 the statute was amended to give to a lessee such as plaintiff the right to a depletion deduction (Revenue Act of 1918, Sec. 214 (a) (10), 40 Stat. 1057, 1067), and for the years 1918 to 1933 plaintiff was permitted to deduct depletion occurring in those years from its income for tax purposes. The regulations which had been

applied for the years 1913–17 were invalidated by the decision of the Supreme Court of the United States in *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, a case in which plaintiff was not a party. This decision, made in 1925, came too late to permit plaintiff to sue for its overpayments made in 1913–17. Those overpayments amounted to $5,568.43, the erroneously disallowed depletion having amounted to $39,672.96.

During the years 1918–33 the defendant, in applying its formula for allowable depletion, treated the coal actually mined in 1913–17, but for which no depletion allowance had been made, as if it were still in place. Specifically, it treated plaintiff as having, in 1918, coal in place of a value of $182,229.95, when in fact that was the 1913 value, plaintiff having taken out coal of the depletion value of $39,672.96 in the years 1913–17. Since the value of intact coal at the beginning of a year is a factor in the formula by which the value per ton of coal mined in that year is set for the purposes of the depletion allowance, plaintiff would have been able, if this treatment of its intact coal as of 1918 had continued, to take all the depletion allowable by the time its mine would have been in fact exhausted, since the depletion unit per ton in the later years would have been larger, and would thus have made up for the amount erroneously disallowed in the years 1913–17.

In 1934, however, the Commissioner of Internal Revenue changed his former practice with reference to plaintiff's operation, and reduced the intact value of the coal, which had up until that time been annually reduced by the value of the number of tons taken out in each of the years 1918–33, by the additional amount of $39,672.96, which, as we have seen, was the value of the number of tons mined in the years 1913–17. The consequence of this reduction was that the smaller intact value thus left, divided by the number of tons actually remaining in place, produced a depletion unit of 6.034 cents per ton for the coal actually mined in 1934. If the $39,672.96 had been left in the intact value, as plaintiff desired, the depletion unit would have been 10.78136 cents per ton. A similar difference existed for 1935. The result-

ing difference in the amount of taxes for the two years was $3,542.92, which, with interest, but reduced by an item of sales tax not in dispute, plaintiff seeks to recover.

Plaintiff does not seriously dispute the correctness of the Commissioner's computations for 1934 and 1935 standing by themselves. The applicable statute (Revenue Act of 1934, Secs. 23(m)(n), 114(b)(1), 113(a)(13), and (b)(1)(B)(C)) required the Commissioner to make deductions for depletion previously allowed but not less than the amount *allowable* under prior income-tax laws. Since the 1913–17 erroneously disallowed depletion was *allowable*, the Commissioner was required to deduct it. But, plaintiff urges, the net consequences of his deducting it in 1934 and 1935, when in fact it had been disallowed in 1913–17, means that plaintiff overpaid its taxes in those earlier years and the government is unjustly enriched by that amount. This is true, and, of course, plaintiff's right to sue directly for a refund of the 1913–17 taxes is long since barred by the Statute of Limitations. (U. S. Code, title 26, section 3772.) But plaintiff urges that by the doctrine of recoupment it may be permitted to subtract its barred overpayment from its current taxes, or may at least insist that the Government pursue to the end the method of computation which it followed in the years 1918–33, which would result in the correction of the overpayments of 1913–17.

We think that we are not free to apply the equitable doctrine of recoupment, assuming that it would otherwise be applicable, because to do so would contradict the specific language of Sections 608 and 609 of the Revenue Act of 1928 (45 Stat. 791, 874). The language of those sections here pertinent is as follows:

Sec. 608:

> A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—
>
> (a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; * * *.

Sec. 609: * * *

(b) Credit of barred overpayment.—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) Application of section.—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

It cannot be that the Commissioner's refusal to do an act, here crediting plaintiff in 1934 and 1935 with overpayments made in 1913–17, which act Section 609 expressly declares to be void if he attempts to do it, will lay the Government open to suit because he did not do it.

The case of *Josephine V. Hall* v. *U. S.*, 95 C. Cls. 539, recently decided by this court, is directly in point. The Hall case followed *McEachern* v. *Rose*, 302 U. S. 56, and that case is likewise controlling here. Plaintiff urges that the case of *Stone* v. *White*, 301 U. S. 532, should control this case. But the statutory provisions directly applicable here were not applicable in *Stone* v. *White*. There trustees paid a tax upon income of a trust, which tax should have been paid by the beneficiary. It was timely, though erroneously, assessed against the trustees before, and paid by them after, the statute had run against collection from the beneficiary. The Court, because of the trustee-beneficiary relation, treated the payment as if it had been made by the beneficiary herself, as it was made from her funds, though the amount was less than it would have been if assessed against her. So the beneficiary was really suing to get back money which she had in fact owed and which had been paid out of her funds by her trustee. It was a clear case for the equitable doctrine of recoupment in the absence of a controlling statute. The Court held that since the collection from the trustees, though erroneous, was not barred by limitation, Section 607, which relates only to overpayments barred by limitation, was not applicable. In the instant case, Sections 608 and 609 are applicable, and we cannot disregard them.

Plaintiff urges that Section 820 of the Revenue Act of 1938 (52 Stat. 447, 581, Internal Revenue Code, Sec. 3801) gives

it a right of adjustment. Plaintiff did not, in its claim for refund filed with the Commissioner of Internal Revenue, include this ground for its claim. We do not determine whether or not its failure in this regard has disqualified plaintiff from here asserting this ground for recovery, as we think Section 820 has no application. Subdivision (f) of that section says:

> No adjustment shall be made under this section in respect of any taxable year beginning prior to January 1, 1932.

Plaintiff contends that since its claim is for a refund of taxes for 1934 and 1935 it comes within the affirmative provisions of the statute, and not within subdivision (f). We think, however, that the intent of the statute was that its operation should not go back of 1932. Here the adjustment sought is really for taxes wrongfully collected in the years 1913–17, rather than for the years 1934 and 1935, and we think that Congress could not have intended to mean that any claim, however old, would come within the statute merely because the later tax, against which the old one might be offset, was for the year 1932 or later.

It follows that plaintiff is not entitled to recover, and its petition will be dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

HARVEY COAL CORPORATION v. THE UNITED STATES

[Nos. 42602 and 43388. Decided December 7, 1942]

Supplemental Findings of Fact and Opinion

Income tax; failure to file timely claim for refund.—(For opinion and original findings of fact, see 92 C. Cls. 186.) Where corporate taxpayer paid original tax imposed for 1929 in March, June,

and September 1930, claim for refund filed in February 1932 was timely filed, and recovery of the original tax was not barred by two-year limitation. (45 Stat. 791, 861.)

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

On December 2, 1940, the court filed special findings of fact with an opinion holding that plaintiff in the above entitled cases was entitled to recover, but suspended the entry of judgment until the filing of a stipulation by the parties, or, in the absence thereof, until the incoming of a report by a commissioner of the court as to the correct amount due plaintiff (92 C. Cls. 186). No stipulation having been filed, the court, on its own motion, on June 24, 1942, referred the cases to a commissioner of the court, who on October 3, 1942, submitted his report showing certain amounts due plaintiff computed in accordance with the court's opinion. Exceptions were filed to that report by the plaintiff and by the defendant on the following grounds, among others: (1) because the commissioner found, in accordance with the court's opinion, that the plaintiff was not entitled to recover any part of the original tax paid by plaintiff for the year 1929 because the same was barred by the statute of limitations; (2) because the commissioner found that the plaintiff was entitled to depletion computed upon the basis of a value to the lessee of $250,000 for the coal in place.

The statement in the court's opinion that the original tax paid by plaintiff for 1929 was barred by the statute of limitations was an inadvertence. Findings 14 and 19 show that the original tax was paid on March 15, 1930, March 20, 1930, June 14, 1930, September 15, 1930, and December 15, 1930, and that the claim for refund was filed on February 8, 1932. Therefore, it was filed within two years from the dates of the payment of the original tax, and recovery of the original tax, therefore, is not barred by the statute of limitations. (45 Stat. 791, 861; U. S. C. A. Int. Rev. Acts, page 436.)

It is plain from a reading of the opinion that in stating that the value of the coal in place was $250,000 the court had

reference to the value to the plaintiff, and a reading of the testimony shows that the value testified to by the witnesses was the value to the plaintiff of the coal in place. Finding 7 of the court's special findings of fact, therefore, is supplemented by inserting the words "to the plaintiff" between the word "value" and the word "of" in the last sentence of that finding.

Judgment will be entered in accordance with the report of the commissioner as supplemented by this memorandum. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

In accordance with the above memorandum opinion, judgment was entered for the plaintiff in the sum of $6,851.48, with interest as provided by law, as follows:

In No. 42602:

$941.12 for 1928, with interest from April 21, 1930;

$1,884.79 for 1929, with interest on $98.85 from May 19, 1933, with interest on $287.69 from April 14, 1931, and with interest on $1,498.25 from December 15, 1930; and in addition, two overpayments of interest for 1929, $18.45, with interest from April 14, 1931, and $30.74, with interest from May 19, 1933.

$2,497.28 for 1930, with interest on $855.35 from June 4, 1932, and with interest on $1,641.93 from December 14, 1931; and in addition, an overpayment of interest for 1930, in the amount of $40.68, with interest from June 4, 1932.

In No. 43388:

$1,438.42 for 1931, with interest on $505.77 from February 23, 1934, with interest on $209 from December 14, 1932, with interest on $233 from September 15, 1932, with interest on $233 from June 15, 1932, and with interest on $257.65 from March 11, 1932.

THE BROOKLYN & QUEENS SCREEN MANUFACTURING CO., A CORPORATION, v. THE UNITED STATES

[No. 43115. Decided October 5, 1942. Defendant's motion for new trial overruled December 7, 1942]

On the Proofs

Government contract; partial payments withheld.—Where the Government withheld without authority partial payments stipulated by and due under a contract, and the contractor served notice that failure to receive the sums due by a certain date would result in its refusal to proceed with the work, and the Government thereafter continued its refusal to make such payments, and after contractor had stopped work, the Government undertook to terminate the contract on the grounds of alleged delay, and for other reasons, it is *held* that the plaintiff is entitled to recover the whole amount due under the contract for the work performed and the material furnished.

Same; rights of contractor.—The law does not allow a defendant by its refusal to observe an obligation of a contract to place a contractor in a position where he can not escape the forfeiture of his rights which have accrued prior to any claimed rights of the defendant to terminate the contract.

Same; no judgment for profits.—The evidence of record is not sufficient to justify a finding as to profit earned to date of defendant's breach.

The Reporter's statement of the case:

In this case decision was originally rendered May 1, 1939, the court deciding that the plaintiff was entitled to recover. Plaintiff's motion for new trial was overruled, and defendant's motion for amendment of findings and motion for new trial were overruled June 26, 1939. On November 6, 1939, defendant's second motion for new trial was overruled.

On January 8, 1940, the court, on its own motion, ordered that the order of November 6, 1939, in so far as it overruled defendant's second motion for new trial, be withdrawn and vacated, and that action on defendant's motion for new trial be held in abeyance pending disposition of the case of *Pink (Liquidator of the National Surety Company)* v. *United States*, No. 44690. (See *post*, page 545).

On October 5, 1942, decision was rendered allowing defendant's second motion for new trial, and vacating the order of June 26, 1939, overruling plaintiff's motion for new trial, and allowing said plaintiff's motion for new trial; the former findings, conclusion of law, and opinion of the court being vacated, set aside, and withdrawn, and new findings, conclusion of law, and opinion being filed, as hereinafter set forth.

Mr. Mahlon C. Masterson for the plaintiff. *Mr. Samuel T. Ansell* was on the brief.

Mr. J. Robert Anderson, with whom was the *Assistant Attorney General*, for the defendant. *Mr. Henry Fischer* was on the brief.

Plaintiff brought this suit to recover $30,858.48 as damages, including profit, sustained under a contract with the defendant. It is alleged that the defendant breached the contract by failing and refusing, without any default by the contractor, to make certain partial payments under Article 16 for the value of work performed under and in accordance with the contract, less 10 percent retained percentage of the progress payments due the contractor. This retained percentage was for the purpose of protecting the defendant under the liquidated damage clause of the contract in the event the contractor should default in completion of the work within the time specified in the contract. The total amount claimed is made up of $16,078.31 due plaintiff for work and material to October 28, 1932, and $14,780.17, representing the amount claimed to have been earned to October 28, 1932 as the portion of the total profit which plaintiff alleges it would have made on the whole contract.

The court, having made the foregoing introductory statement, on October 5, 1942, entered special findings of fact as follows:

1. Plaintiff is a New York corporation and is engaged in the general contracting business. March 20, 1932, it entered into a contract with the defendant, represented by the Assist-

ant Secretary of the Treasury, to furnish all work required for the construction, including approaches, of the Post Office at Hempstead, New York, for the consideration of $133,920 in accordance with the terms of the contract and specifications. By additional work orders issued by the defendant, the consideration was increased to $135,941.41. The contract and specifications are in evidence as plaintiff's exhibits 5 and 1, respectively, and are made a part of these findings by reference.

April 2, 1932, plaintiff furnished defendant a performance bond in the sum of $70,000 with the National Surety Company as surety, which bond is in evidence as plaintiff's exhibit 6 and is made a part hereof by reference.

2. April 12, 1932, defendant gave plaintiff notice to begin work under the contract. The contract provided that work should be commenced within ten days after notice to proceed, and on April 13 plaintiff notified the defendant that it would commence work under the contract on April 20, 1932, and it did so. The contract provided that if the work should not be completed within 360 calendar days after date of receipt of the notice to proceed, plaintiff would be charged liquidated damages. By reason of the defendant's order for the performance of additional work, the time for completion was extended 60 days, increasing the time limit to 420 calendar days.

Art. 9 of the contract contained the provision usual to such contracts, that if the contractor refused or failed without justifiable excuse to prosecute the work, or any separable part thereof, with such diligence as would insure its completion within the time specified in Art. 1, or any extension thereof, or failed to complete the work within such time, the Government might, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there had been delay; that, in such event, the Government might take over the work and prosecute the same to completion by contract or otherwise, and that the contractor and his sureties would be liable to the Government for any excess cost occasioned the Government thereby; that if the contractor's right to proceed should be

so terminated, the Government might take possession and utilize in completing the work such materials, appliances, and plant as might be at the site of the work and necessary therefor; that if the Government did not terminate the right of the contractor to proceed, the contractor should continue the work, in which event the actual damages for the delay would be impossible to determine and in lieu thereof the contractor should pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work should be completed or accepted the amount set forth in the specifications, provided however that the right of the contractor to proceed would not be terminated or the contractor charged with liquidated damages because of any delays in completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, among others, the acts of the Government.

3. Plaintiff did not become liable under the contract for damages, liquidated or unliquidated, to the defendant; no attempt was made to so charge the plaintiff, and no claim is here made by the defendant that it was entitled under the contract to charge the plaintiff for liquidated damages at the time plaintiff ceased work under the contract and abandoned it on the ground that the defendant had breached it, of which notice was given by plaintiff to the defendant in writing. Art. 16 of the contract provided as follows:

> *Payments to contractors.*—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the materal delivered on the site and preparatory work done may be taken into consideration.
>
> (b) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract: *Provided, however,* That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: * * *

Defendant breached the above quoted contract provision. By reason of such breach plaintiff exercised its right to stop work and refuse to proceed further therewith. Plaintiff did not at any time breach any of the provisions of its contract with defendant.

The defendant did not at any time become entitled to terminate the right of plaintiff to proceed or to terminate or cancel the contract under Article 9 or any other provision of the contract.

4. Partial or progress payments under the contract were made by the defendant to the plaintiff for progress work completed for each of the months April to and including August 1932, as follows: May 7, $2,250; June 8, $2,880; July 11, $7,020; August 25, $4,770; and September 12, 1932, $6,300. No further partial progress payments were made to plaintiff by the defendant as required by the contract. The value of the work, less 10 percent performed and completed by plaintiff in the month of September 1932, was $2,250, and the value of such work, less 10 percent completed in October 1932, was $5,130.

5. The voucher for the progress partial payment for work performed and completed by plaintiff in the month of September 1932 was duly prepared and approved by the defendant's construction engineer, signed by plaintiff, and forwarded to the Treasury Department for payment, and was approved by the contracting officer. Plaintiff thereafter made repeated requests of the defendant for payment thereof as provided in the contract but the defendant failed and refused without justifiable cause under the contract to make payment. In the meantime plaintiff was proceeding with the work.

In a letter of October 26, 1932, after the September progress payment was due, plaintiff notified the contracting officer that if the check for the progress payment called for by the contract for the work performed and completed for the month of September was not received by October 28, 1932, it would stop work on the contract and proceed no further therewith because of the refusal of the defendant to pay the same as provided in the contract. Upon receipt of this notice the defendant refused to make the payment and

the plaintiff, on October 28, 1932, stopped all work in progress under the contract and thereafter declined to proceed further, and did nothing toward its completion by reason of the failure of the defendant to make progress payments as called for by Art. 16.

6. Defendant failed and refused to make any progress partial payments for work performed after the month of August 1932 following the receipt of plaintiff's letter of October 26. The defendant on November 2, 1932, requested plaintiff to come to Washington for a conference. A few days later this conference was held in Washington with the Supervising Architect of the Treasury and the contracting officer. Defendant had withheld progress payments solely because of political interference in a controversy between plaintiff and a person other than the Government. Plaintiff complained that political interference was affecting its credit. Political interference preceding this conference had obtained to some extent and had served to embarrass plaintiff and to some extent affect its credit; but it did not appear, and the defendant did not claim then or later, that plaintiff would not be able to perform and complete the contract within the contract time if the defendant had made the progress payments as stipulated in the contract. The defendant did not at this conference or at any time prior to November 25, 1932, state to plaintiff or otherwise notify it that it contemplated terminating the contract or that it would do so by reason of the conditions and circumstances existing up to that time, or because of any lack of proper progress toward completion of the contract by the plaintiff or by reason of plaintiff's failure to comply with any of the other provisions of the contract. In fact plaintiff was urged by the defendant to proceed with the work. There was still sufficient time for plaintiff to complete the contract on time. Defendant's attitude at that time was conciliatory, not aggressive, but it still refused to make progress partial payments, and by this refusal it breached the contract.

7. Thereafter, on November 25, 1932, a month after plaintiff had notified the contracting officer that it would stop work on the contract and proceed no further therewith, and after plaintiff had stopped work under the contract by

reason of the refusal of the defendant to make the progress partial payments due under Art. 16, the defendant undertook to terminate the contract under Art. 9. Defendant immediately took actual possession of all materials, appliances, and the plant of the plaintiff. No further payments of any kind were thereafter made or offered to be made by the defendant to plaintiff, either for the work performed or for the materials, etc., taken over by the defendant and used by it. In the defendant's letter of November 25 attempting to terminate the contract this language was used—"terminated this date due to delay in completion of work and for other reasons." Following that date, plaintiff's surety elected to take over the work and completed the building.

8. At the time plaintiff stopped work on the contract on October 28, 1932, and at the time the defendant attempted to terminate the contract on November 25, 1932, the value of the work in place, and theretofore performed by plaintiff, was $34,000, of which amount plantiff had been paid by the defendant in progress partial payments under and in accordance with the contract $23,220, leaving a balance due plaintiff, including the 10 per cent retained, of $10,780. The actual value of the materials for the building on the site of the work at the time was $5,186.31 and the value of the tools and equipment on the site, which the defendant took, was $112. No part of the three sums above named, and totaling $16,078.31, has been paid to plaintiff or to anyone else, but such sums are now in possession of the defendant.

9. From and after commencement of the work under the contract by the plaintiff April 20, 1932, the defendant's construction engineer in charge of the work made monthly progress reports to the contracting officer. These progress reports are in evidence as defendant's exhibits 13 (a) to (i), inclusive, and are made a part hereof by reference, and they correctly set forth the conditions under the headings "Per Cent Completed," "Equipment," "Force," "Progress," "Delivery of Materials," and "Samples Overdue." At the end of September 1932 progress toward final completion of the work was not more than 25 per cent behind normal on the period of 360 days. The contracting officer with full

knowledge of existing conditions did not at any time prior to the breach of Art. 16 of the contract by the defendant consider that the condition of progress of the contractor was such a failure of the contractor to properly prosecute the work with such diligence as would insure its completion within the contract time of 420 days. There is no proof by the defendant that if the defendant had made the progress partial payments, as provided by the contract, the plaintiff would not have completed the work called for by the contract within the period agreed upon.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff brought this suit to recover $30,858.48 from the defendant for work performed and materials furnished and profit earned to October 28, 1932. The amount of $16,078.31 represents the sum due from the defendant for materials furnished and work performed and not paid for in the amount of $10,780, which includes the 10 percent previously retained by the defendant from progress payments made, and $5,298.31, the value of the materials, tools, and equipment on the site which were taken and used by the defendant. The balance of $14,780.17 represents profit claimed to October 28, 1932. The basis of the claim is that the defendant breached the contract by refusing to make progress partial payments, as stipulated in Article 16 of the contract, after the payment for the month of August 1932.

May 1, 1939, the court entered findings of fact, conclusion of law, and opinion in which the court found and held that defendant had breached the contract; that the plaintiff was justified in stopping the work October 28, 1932 and proceeding no further with the contract and that the defendant did not have the right under Art. 9 or any other provision of the contract, after it had breached the contract, to terminate it for an alleged cause of which it had knowledge long prior to the attempted termination, and which it did not at any time, prior to and for at least a month after the plaintiff had stopped work, consider or assert as justifying termination of the contract. As a matter of fact, as the proof

shows, the termination of the contract on the ground asserted—namely, that the contractor was not diligently proceeding with the work or could not complete the contract within the period provided therein, was not justified. Judgment was entered May 1, 1939, in favor of plaintiff for $7,380, which represented only the progress partial payment of $2,250, after deduction of 10 percent for work completed in September 1932, and the value of the work performed and completed amounting to $5,130, after deduction of 10 percent, during October 1932.

Plaintiff filed a motion for a new trial May 12, 1939, and the defendant filed a motion for a new trial June 10, 1939. These motions were overruled June 26, 1939. On June 1, 1939, there was instituted a suit against the defendant by the filing of a petition by the liquidator of the National Surety Company, which was the surety on plaintiff's performance bond to the defendant, to recover $17,955.16, which included the amount of $16,078.31, value of work performed and material furnished, sued for by plaintiff, as well as the amount of $7,380 for which the court had entered judgment for plaintiff. Thereafter the defendant in August 1939, filed a motion for leave to file, accompanied by a second motion for a new trial, on the ground that the second suit by the liquidator of the National Surety Company, instituted subsequent to the court's opinion, asserted a right to recover certain of the same sums involved in plaintiff's suit, and that the court should hold plaintiff's case open until the second suit was tried and submitted in order that the court might consider both cases and determine who was entitled to the funds in the hands of the defendant. August 24, 1939, the court granted the motion for leave to file the second motion for a new trial in order to hold this case in abeyance until the second suit should be submitted.

The second suit, No. 44690, by the liquidator of the National Surety Company has been tried, submitted, and considered. The defendant's second motion for a new trial in this case is allowed. The order of June 26, 1939 overruling plaintiff's motion for a new trial is vacated and set aside. Plaintiff's motion for a new trial is allowed and the former

findings, conclusion of law, and opinion of the court are vacated, set aside, and withdrawn, and new findings, conclusion of law, and opinion are this day filed.

The defendant now states in its brief in the case of *Anderson, Liquidator for the National Surety Company, et al.* v. *United States*, No. 44690, as follows:

> Defendant admits having in its possession the sum of $17,955.16 as the unpaid balance under the contract in question. Its sole interest is to avoid double liability. The question before the court is the disposition of that fund between the plaintiff in this case [No. 44690] and The Brooklyn & Queens Screen Manufacturing Company, plaintiff in No. 43115.

The facts with reference to the contract between plaintiff and the defendant, the work performed thereon by the plaintiff and the reasons upon and for which plaintiff ceased work under the contract, and the amount of $16,078.31 owing by the defendant, including the value of small tools and equipment taken over and used by the defendant, are set forth in the findings, which need not be restated here. Upon those facts we are of opinion, upon further consideration, that plaintiff is entitled to recover this sum of $16,078.31. The balance of $1,876.85 in defendant's hands resulted from work performed by the National Surety Company.

Art. 16 of the contract provided that partial payments would be made to plaintiff by the defendant as the work progressed at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer; that in preparing estimates for the purpose of progress payments, materials delivered on the site and the preparatory work done should be taken into consideration, and that in making such partial payments there should be retained by the Government ten per cent of the estimated amount, until final completion and acceptance of work covered by the contract, with the proviso that the contracting officer at any time after 50 percent of the work had been completed might make any of the remaining monthly partial payments in full.

Art. 9 of the contract provided that the contracting officer

might terminate the right of the contractor to proceed with the work under contract if the contractor refused or failed to prosecute the work with such diligence as would insure its completion within the period specified in the contract, or as extended, and not caused by acts of the Government or other excusable causes. This article further provided that if the right of the contractor to proceed was not terminated for the cause mentioned, the contractor should continue with the work, and if the same was not completed within the time specified the contractor would pay to the Government liquidated damages at a specified rate until the work was completed for any delay in completion, not excusable under the terms specified in the article, and for which the contractor was responsible. The right of the contracting officer to terminate the contract under Art. 9 did not arise prior to and did not exist, and was not claimed, on or prior to the date when plaintiff notified the contracting officer on October 26, 1932, that if he did not make the progress payment due and determined by him to be due, by October 28, 1932, the contractor would consider the contract breached by the defendant and that it would stop work and proceed no further with it. The contracting officer continued his refusal to pay. This was a breach of the contract. Plaintiff refused to proceed further with the work. About a month thereafter the defendant attempted under Art. 9 to determine the right of plaintiff to proceed. But this was an after-thought and under the facts is ineffective as a defense to the claim of plaintiff for the amount shown to be due under the contract to October 28, 1932. Plaintiff relied upon and needed the progress payments provided for in Article 16 of the contract. In *Pigeon* v. *United States*, 27 C. Cls. 167, 175, this court held:

> The law requires the right of forfeiture to be exercised in strict pursuance of the power and in apt time. It can not be founded upon a fault once forgiven, and upon the faith of which forgiveness the derelict party has ventured forward in the performance of his duty. * * *
>
> His condition might have been such, that without monthly payments it was not practicable for him to

> proceed with the work. He had a right to assume from the inception of the work that he would be paid according to the requirement of the contract; and the failure of the Government to pay justified him in refusing to proceed on the 5th of October 1881. Whatever might have been his faults up to that time, the Government having permitted him to proceed, having accepted the performance of the contract during the month of September, and having received the benefit of his labor during that period, it was not in its power to withhold the pay in order that it might be secured against the consequence of a probable or possible failure.

To the same effect are *Canal Company* v. *Gordon*, 6 Wall. 561, and *Whitbeck, Receiver of L. W. F. Engineering Co.* v. *United States*, 77 C. Cls. 309.

The defendant complied with Art. 16 of the contract by making progress payments as therein provided until the month of September 1932. The voucher for the month of September was duly prepared and approved by the contracting officer and nothing remained to be done except to make payment thereof. Further progress payments were withheld solely because of political reasons. The record is voluminous, but much of the testimony is in our opinion irrelevant and immaterial to the question presented. The issue in the case is confined to the single point of whether the defendant breached the contract by the admitted refusal to make accrued progress payments. An exploration into plaintiff's past and contemporaneous acts and conduct concerning other contracts and having nothing to do with the performance by plaintiff of the contract to which the defendant was a party, does not aid in the solution of the case. In the trial of the case counsel for the defendant sought to excuse the defendant for not making any progress payments after the August 1932 progress payment on the alleged ground that plaintiff had failed to make sufficient progress toward completion of the contract work under Art. 9 of the contract. But lack of progress was not the reason for the refusal nor was the refusal to pay based upon any provision of the contract between plaintiff and the defendant. It is true that at the time plaintiff stopped work, because the defendant refused to pay it, plaintiff was slightly behind schedule but

the contracting officer with full knowledge of all the facts and circumstances concerning this never at any time deemed the state of plaintiff's progress up to that time sufficient to indicate, much less to justify the conclusion, that plaintiff would not or could not complete the work within the contract time. Nor had he asserted a right to terminate the right of the contractor to proceed on that ground. Moreover, when the plaintiff notified defendant that it would stop work unless progress payments were made as called for by the contract and after plaintiff had actually stopped work, the contracting officer did not claim the right to terminate or cancel the contract for refusal or failure of the contractor to properly prosecute the work with such diligence as would insure its completion within the contract time. Defendant's witness testified that at the time plaintiff stopped work there remained sufficient time to complete the work within the contract period. In these circumstances it is clear that the contracting officer had acquiesced in the progress which plaintiff had made and was making, and the asserted right to terminate and cancel the contract later stated in the letter to the contractor November 25, 1932, was an afterthought. Up to the time the defendant breached the contract, plaintiff was going forward with the contract work, and while some difficulties intervening had, to some extent, slowed its progress, the record establishes that the contracting officer did not regard plaintiff's progress to be so much retarded as to warrant termination of the contract. The "delay in completion of the work" mentioned in the contracting officer's letter of November 25, 1932, was the "delay" after October 28, 1932 when plaintiff stopped work because of defendant's refusal to make any further progress payments. Of course, defendant could not use that "delay" as a justification for attempted termination after it had breached the contract.

The primary contractual authority of the defendant was dependent upon the observance by it of its obligations as provided in the contract. The law does not allow the defendant by its refusal to observe an obligation of a contract to place a contractor in a position where he cannot escape forfeiture of his rights which have accrued prior to any rights of the defendant under any provisions, such as Article

9. Plaintiff is entitled to recover the first item of its claim amounting to $16,078.31.

The plaintiff's proof is not sufficient to justify the allowance of the claimed profit of $14,780.17 to October 28, 1932 when it stopped work because of defendant's breach.

Judgment will therefore be entered in favor of plaintiff for $16,078.31. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

RUPERT W. K. ANDERSON, ASSISTANT SPECIAL DEPUTY SUPERINTENDENT OF INSURANCE FOR THE STATE OF NEW YORK, AS LIQUIDATOR FOR THE NATIONAL SURETY CO., FOR ITS OWN USE AND FOR THE USE OF CERTAIN SUBCONTRACTORS, INCLUDING C. H. CRONIN, MANHATTAN FIREPROOFING CO., INC., ET AL. v. THE UNITED STATES

[No. 44690. Decided October 5, 1942. Plaintiff's motion for new trial overruled December 7, 1942]

On the Proofs

Government contract; breach of contract by defendant; rights of surety; subrogation.—Following the decision in *Brooklyn & Queens Screen Manufacturing Company* v. *United States, ante*, page 532, it is *held* that, where contract was breached by defendant and it is shown that contractor was justified in refusing to complete the work under contract, there was no legal liability on the part of contractor's surety to complete the work or respond in damages to the Government, and plaintiff is not entitled to recover the amount owing to contractor up to and at the time said contractor ceased work.

Same.—Where there was no default or breach of the contract by the contractor, no liability attached to the surety under the terms of the bond, and no subrogation to the rights of the principal. *Prairie State National Bank* v. *United States*, 164 U. S. 227, and similar cases cited. A surety is not entitled to subrogation until he has paid the debt, and, secondly, a volunteer is not so entitled. *The Illinois Surety Co.* v. *Mitchell*, 177 Ky. 367 (197 S. W. 844).

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *Messrs. King & King*, and *Mr. Robert Watson* were on the brief.

Mr. Elihu Schott, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

In this case the plaintiff, as liquidator of the National Surety Company, seeks to recover on behalf of that company and for the use of certain of its subcontractors, the sum of $17,955.16 as the unpaid balance owing by the defendant under a contract dated March 30, 1932, for the construction by the Brooklyn & Queens Screen Manufacturing Company of a post-office building at Hempstead, New York, under which contract the National Surety Company became surety on the performance bond of the Brooklyn & Queens Screen Manufacturing Co., to the defendant.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Rupert W. K. Anderson was appointed Assistant Special Deputy Superintendent of Insurance and agent of the Superintendent of Insurance of the State of New York May 10, 1935, to take possession of the property and liquidate the business of the National Surety Company, and is now serving in that capacity.

The National Surety Company on April 2, 1932, became surety on the bond of The Brooklyn & Queens Screen Manufacturing Company for the faithful performance by that company of a contract dated March 30, 1932, for the erection of a post office building at Hempstead, New York.

2. The Brooklyn & Queens Screen Manufacturing Company commenced work under the contract and proceeded therewith until October 28, 1932, at which time it stopped work and proceeded no further with the work called for by the contract due to a breach of the contract by the defendant by reason of its refusal to make progress payments to the contractor for work performed and completed in accordance with Art. 16 of the contract. The pertinent

and material facts with reference to the contract and the acts of the defendant and the contractor, The Brooklyn & Queens Screen Manufacturing Company, regarding the work and the payments thereunder to November 25, 1932, are fully set forth in the special findings of fact in the case of *The Brooklyn & Queens Screen Manufacturing Company*, No. 43115, decided this day, *ante*, page 532. Those findings are incorporated in these findings and made a part hereof as fully as if set forth herein.

3. Subsequent to November 25, 1932, the National Surety Company, upon notice from the defendant, elected to complete the work called for by the contract between the United States and The Brooklyn & Queens Screen Manufacturing Company and thereafter completed the work, which was accepted by the United States, and plaintiff was paid the balance of the price stated in the contract, as modified by certain change orders, less the sum of $17,955.16, of which amount the sum of $16,078.31 represented the amount owing by the United States under the contract up to and at the time The Brooklyn & Queens Screen Manufacturing Company, the prime contractor, stopped work under the contract on October 28, 1932, as set forth in the findings in Case No. 43115, which are incorporated herein, as above stated. This last-mentioned amount of $16,078.31 was for material furnished and work performed by The Brooklyn & Queens Screen Manufacturing Company and the value of tools and equipment taken over and used by the Government and the plaintiff. The balance of $1,876.85 represents the amount due and owing by the defendant in connection with work performed by the National Surety Company subsequent to November 25, 1932, and between that date and the date on which the National Surety Company completed the work.

4. On January 7, 1936, the United States of America, as plaintiff, on behalf of and for the use of Carroll-McCreary Co., Inc., and Behrer & Company, filed Bill in Equity No. 7862 in the United States District Court for the Eastern District of New York against The Brooklyn & Queens Screen Manufacturing Co., Inc., and Louis H. Pink, successor to George S. Van Schaick, Superintendent of Insurance of the State of New York, as liquidator of the

National Surety Company and the estate of the National Surety Company, defendants. On March 18, 1936, pursuant to Equity Rule 17, the Court ordered, adjudged and decreed that the use plaintiffs were the owners of and entitled to the immediate possession of the sums of $3,535.92 and $218.30, respectively, with interest, as part of a fund of $17,955.16, in the possession of the United States remaining unpaid under the contract mentioned in finding 1 herein. The "use" plaintiffs appear to have been sub-contractors of the National Surety Company. The decree of the court is filed in this case as defendant's exhibit A, and is made a part of this finding by reference. The Brooklyn & Queens Screen Manufacturing Company was not served with process or summons in that case. It was not before the court, and as shown by the decree no adjudication was made by the court against the Brooklyn & Queens Screen Mfg. Co.

The court decided that the plaintiff was entitled to recover only the amount, $1,876.85, representing the balance due and owing by the defendant in connection with the work performed by the plaintiff subsequent to November 25, 1932, and between that date and the date on which plaintiff completed the work.

LITTLETON, *Judge*, delivered the opinion of the court:

Upon the findings and for the reasons set forth in the case of *The Brooklyn & Queens Screen Manufacturing Company* v. *United States*, No. 43115, this day decided, the plaintiff is not entitled to recover $16,078.31 of the $17,955.16, which the defendant admits to be due either to The Brooklyn & Queens Screen Manufacturing Company or to the plaintiff as liquidator of the National Surety Company. Plaintiff seeks judgment for the entire amount of $17,955.16 on the ground that when it elected to complete the work for the Government it was subrogated to all the rights which The Brooklyn & Queens Screen Manufacturing Company may have had under contract, and that, although a portion of the amount was owing from the defendant under the contract at the time the prime contractor stopped work, such contractor is not entitled to any part of it. We cannot

agree. The facts show and we have held in Case No. 43115 that the defendant breached Article 16 of the contract and that The Brooklyn & Queens Screen Manufacturing Company was justified in refusing to go ahead with the work under contract. In these circumstances there was no legal liability on the part of the National Surety Company on the bond of the contractor to complete the work or respond in damages to the Government. There was no default or breach of the contract by the contractor and, therefore, no liability attached to the Surety Company under the terms of the bond. The case of *Prairie State National Bank* v. *United States*, 164 U. S. 227, held that a surety on a bond who is required to step in and perform all the obligations of a defaulting contractor is subrogated to whatever rights such contractor might have under the contract, but the court also held as follows:

> As said by Chancellor Johnson in *Gadsen* v. *Brown*, Speers, Eq. 38, 41, (quoted and referred to approvingly in the opinion in *Aetna L. Ins. Co.* v. *Middleport*,) "the doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature *never could have been intended for the relief of those who were in any condition in which they were at liberty to elect* whether they would or would not be bound; and, as far as I have been able to learn its history, it never has been so applied." [Italics ours.]

In the case of *German Bank of Memphis* v. *United States*, 148 U. S. 573, the court said:

> The equitable doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his own rights or to save his own property. *Slade* v. *Van Vechten*, 11 Paige 21; *Cole* v. *Malcolm*, 66 N. Y. 366; *Sanford* v. *McLean*, 3 Paige, 117; *Atlantic Ins. Co.* v. *Storrow*, 5 Paige, 285; *Graham* v. *Dickinson*, 3 Barb. Ch. 169; *Ellsworth* v. *Lockwood*, 42 N. Y. 89.

In *Aetna Life Insurance Company* v. *Middleport*, 124 U. S. 534, the court cited with approval the case of *Suppiger* v. *Garrels*, 20 Broadw. 625, in which the court said:

> Subrogation in equity is confined to the relation of principal and surety and guarantors, to cases where a

person to protect his own junior lien is compelled to remove one which is superior, and to cases of insurance. * * * *Anyone who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer.* [Italics ours.]

Further, in the case of *The Illinois Surety Co.* v. *Mitchell* 177 Ky. 367 (197 S. W. 844), it was held that "There are, however, two definite limitations to the doctrine [of subrogation] as above broadly stated: First, a surety is not entitled to subrogation until he has paid the debt; and, secondly, *a volunteer is not so entitled.*"

Plaintiff is entitled to recover only $1,876.85 and judgment will be entered in his favor for that amount. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and WHALEY, *Chief Justice,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

THE AVIATION CORPORATION v. THE UNITED STATES

[No. 45186. Decided June 1, 1942. Plaintiff's motion for new trial overruled October 5, 1942]*

On Defendant's Plea in Bar

Income tax; settlement of civil and criminal liability by compromise agreement.—Where in connection with the transaction to which the plaintiff's claim relates a compromise was effected, after repeated conferences in which representatives of plaintiff participated, resulting in the dismissal of indictments against interested officials and the payment in full of the tax, including penalty and interest, and it was agreed that there would be no further proceedings, civil or criminal; it is *held* that there was a fully authorized compromise settlement of the entire matter, and accordingly plaintiff has no cause for action and the petition is dismissed.

Same; authority of Attorney General to effect settlement.—Where under the act of June 30, 1932 (U. S. Code, Title 5, Section 124), authorizing the President to transfer the whole or any part of any executive agency or the functions thereof to the jurisdiction and control of any other executive agency; and by the terms of section 5 of the Executive Order No. 6166 (U. S. Code,

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*Plaintiff's petition for writ of certiorari denied March 1, 1943.

Title 5, Section 132), the function of prosecuting in the courts any claims by, and against, the United States was transferred to Department of Justice, together with the authority to prosecute, to defend, to compromise or to abandon prosecution; it is *held* that under said order, if not under his general powers, the Attorney General had authority to settle both the civil and criminal liabilities arising out of the transaction involved in the instant case.

Same; transfer of stock a sale and not an intercompany transaction.—Where, on May 16, 1929, the Universal Aviation Corporation sold to The Aviation Corporation, plaintiff, 50,000 shares of the capital stock of the Fokker Company for a profit of $2,248,000; and where, later, during August 1929, plaintiff completed the acquisition of more than 95% of the stock of the Universal Aviation Corporation; and where, thereupon, the books were changed to show that said sale was rescinded and to show in place and instead of a sale a loan for the full amount of the purchase price with option to purchase, which option was exercised on September 4, 1929; it is *held* that said transaction was not an intercompany transaction but a sale which was completed in May 1929.

Same; settlement effected was a compromise.—Where plaintiff's own proposal, as outlined by its vice president, covered not only any alleged tax liability but also full settlement and dismissal of indictments then pending, and the further agreement that the Government would take no further proceeding, criminal or civil, against any party at interest; it is *held* that the settlement effected was in fact a compromise.

Same; errors in computation.—Where, in the compromise offer submitted by plaintiff, it was stated that any error in computation of tax and penalty would be later adjusted; and where an adjustment was in fact later made; it is *held* that the language used in said compromise offer was not evidence of an intention to leave the entire question open as to whether there was any tax liability.

Same; "consideration."—Where plaintiff was the transferee of the assets of Universal Aviation Corporation and took such assets subject to the legal obligations of said corporation; and where several of the indicted officials were officials either of the Universal Corporation or the plaintiff company at the time the transaction occurred; and where officials of the plaintiff company participated in the negotiations for a settlement; it is *held* plaintiff had such interest in the compromise settlement as to constitute a "consideration."

Same; volunteer.—Even if it were conceded that plaintiff company had no financial interest in the transaction, it would, there being no duress, then be placed in the position of a volunteer, which would prevent recovery.

Same; duress.—Where the initiative in the move to secure a settlement was taken by the attorneys for the individuals who were indicted; and the subsequent negotiations leading to settlement were participated in by the officials of the plaintiff company, there was no duress.

The Reporter's statement of the case:

Mr. John E. Hughes for the plaintiff. *Messrs. John F. O'Ryan* and *Basil O'Connor* were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing by virtue of the laws of the State of Delaware and has its principal office in New York City, New York.

2. The Universal Aviation Corporation was organized in 1928 and dissolved on April 22, 1931.

3. On or about April 22, 1931, the assets of the Universal Aviation Corporation were transferred to The Aviation Corporation. On March 15, 1930, the Universal Aviation Corporation and subsidiaries filed a tentative corporation income tax return for the period January 1 to August 1, 1929, showing a net loss for that period amounting to $350,000.

On May 15, 1930, the Universal Aviation Corporation filed a corporation income tax return for the period January 1 to August 1, 1929, showing a gross income of $802,403.38, deductions of $1,221,076, and a net loss of $418,673.32.

4. On August 17, 1936, the Commissioner of Internal Revenue assessed against the Universal Aviation Corporation taxes, penalties, and interest amounting to $850,293.29 for which this suit is brought.

5. On June 1, 1934, the Acting Commissioner of Internal Revenue addressed a communication to Honorable Frank J. Wideman, Assistant Attorney General, Department of Justice, Washington, D. C., recommending the institution of criminal proceedings against Halsey Dunwoody and George B. Schierberg under Section 146 (b) of the Revenue Act of

1928 for willfully attempting to evade and defeat the federal income tax of the Universal Aviation Corporation for the period January 1 to August 1, 1929, and against Graham B. Grosvenor, A. O. Cushny, Halsey Dunwoody, George B. Schierberg, Dan W. Jones, Frederick J. King, and William Dewey Loucks under Section 37 of the United States Criminal Code, for conspiring to evade and defeat the federal income tax of the Universal Aviation Corporation for the period January 1 to August 1, 1929. The recommendations are contained in the following paragraph of this letter:

> It is, therefore, recommended that criminal proceedings be instituted against Hulsey Dunwoody and George B. Schierberg under Section 146 (b) of the Revenue Act of 1928 for wilfully attempting to evade and defeat the Federal income tax of the Universal Aviation Corporation for the period January 1, 1929, to August 1, 1929, and against G. B. Grosvenor, A. O. Cushny, Halsey Dunwoody, George B. Schierberg, Dan W. Jones, Fred J. King and William Dewey Loucks under section 37 of the United States Code for conspiring to evade and defeat the Federal income tax of the Universal Aviation Corporation for the same period.

The basis for this recommendation was the failure of the Universal Aviation Corporation to report in its income tax return for January 1 to August 1, 1929, a profit of $2,248,-000.00 from the sale of 50,000 shares of the capital stock of the Fokker Aircraft Corporation of America on May 16, 1929.

6. During the period from January 1 to August 1, 1929, the following named persons held offices in The Aviation Corporation, plaintiff herein: Graham B. Grosvenor, President; A. O. Cushny, Treasurer; Frederick J. King, Assistant Treasurer and Assistant Secretary; William Dewey Loucks, Vice President and General Counsel; Alexander H. Beard, Secretary and Comptroller.

None of the individuals aforesaid were officers of The Aviation Corporation at the time the indictments were returned. During the period from January 1 to August 1, 1929, the following named persons held the offices indicated in the Universal Aviation Corporation: Dan W. Jones, President; Halsey Dunwoody, Vice President; George B. Schierberg, Treasurer.

7. On June 20, 1934, two indictments were returned by the grand jury to the United States District Court for the Eastern District of Missouri one against Halsey Dunwoody and George B. Schierberg, charging them with attempting to defeat and evade income taxes of the Universal Aviation Corporation for the period January 1 to August 1, 1929, and the second indictment against Dan W. Jones, Halsey Dunwoody, George B. Schierberg, Graham B. Grosvenor, A. O. Cushny, Frederick J. King, William Dewey Loucks, and Thurman H. Bane, charging conspiracy to evade and defeat the income tax of the Universal Aviation Corporation for the same period.

8. The following named officers of The Aviation Corporation were not holding office on the return date of the indictments here in question. The offices held, respectively, and the dates of severance with the corporations are set forth below:

Name	Office	Date of termination
Graham B. Grosvenor	President	Apr. 17, 1930
	Director	Nov. 29, 1932
A. O. Cushny	Treasurer	Mar. 15, 1933
Frederick J. King	Asst. Treasurer	Apr. 30, 1930
	Asst. Secretary	Sept. 12, 1930
William Dewey Loucks	Director	Nov. 29, 1932
	Vice President	Dec. 6, 1932
	General Counsel	Dec. 6, 1932
Alexander H. Beard	Secretary and Comptroller	May 20, 1930 May 20, 1930
Thurman H. Bane	Vice President and Director	Feb. 22, 1932 Feb. 22, 1932

9. The several defendants, A. O. Cushny, Alexander H. Beard, Frederick J. King, William Dewey Loucks and Graham B. Grosvenor demurred to the indictments, but on October 25, 1934, the District Court overruled the demurrers.[1]

10. The cases were originally set for trial on October 29, 1934, but after the demurrers were overruled on October 25, 1934, the trial date was postponed to January 21, 1935. The cases were prepared for trial but because of the illness of one of the attorneys were continued to February 18, 1935.

11. On October 23, 1934, the Assistant General Counsel for the Bureau of Internal Revenue addressed the follow-

[1] *United States v. Dan W. Jones et al.*, not reported but filed as defendant's exhibit 16 in the instant case.

ing communication to Hiram C. Todd, counsel for William Dewey Loucks:

> On June 20, 1934, eight individuals, including your client, William Dewey Loucks, were indicted by a Federal grand jury for conspiracy to wilfully attempt to evade a tax in the amount of $201,225.93 upon the net income of the Universal Aviation Corporation for the period ended July 31, 1929, and for conspiracy to defraud the United States of that tax. A demurrer was filed to the indictment, which demurrer was argued recently. No decision on the demurrer has been made by the court.
>
> A few days ago you requested that I review the facts in the case and express an opinion as to whether or not an offer in the amount of $75,000.00 in compromise of all civil and criminal liabilities would be acceptable to the Bureau in the case. In accordance with that request, I have studied carefully all of the facts and evidence and have reached the conclusions that the acceptance of such an offer would not be to the best interests of the Government and that, therefore, this office would not recommend such a settlement.

12. On January 9, 1935, plaintiff by its Vice President R. S. Pruitt, addressed a letter to Hon. Homer S. Cummings, Attorney General of the United States, reading as follows:

> The Government in June, in the District Court of the Eastern District of Missouri, entered certain indictments against Dan W. Jones and others. In the body of the indictment the Government alleges that the Universal Aviation Corporation had a taxable income upon which it has not paid a tax, of $1,829,326.68, upon which the Government computes a tax of $201,225.93, which it alleges was due and payable as of March 15th, 1930. Since that time the Government, in oral conversation, has conceded under a recent decision of the Supreme Court, that there should be deducted from said alleged taxable income of $1,829,326.68, the reported losses of the subsidiaries of Universal Aviation Corporation for the year 1928, amounting to the sum of $53,157.21, which would make the taxable income, upon the basis aforesaid, $1,776,169.47, and an alleged tax of $195,378.60.
>
> Evidence has been submitted to you showing there was no fraud in connection with the facts alleged in

the indictment, and no tax liability, and the undersigned confidently believes these to be the facts.

During the conferences had with the Governmental Departments, it has appeared that the Government is asserting the full tax claim as above outlined, together with interest upon the tax from March 15th, 1930, together with 50% of the tax as penalty, against the undersigned as transferee of all of the assets of Universal Aviation Corporation, and the undersigned has been advised that irrespective of the outcome of a trial of the above indictments, the Government will proceed in its efforts to collect such tax, interest, and penalties from the undersigned.

The undersigned, therefore, hereby tenders you its check in the aggregate of $349,532.34, made up of the following items:

Tax	$195, 378. 60
Interest at 6% upon said amount from March 15, 1930, to and including January 8, 1935	56, 464. 44
Penalties	97, 680. 30

in full settlement of said alleged tax liability, upon the understanding that you will receive the same in such full settlement and at once dismiss the indictments heretofore handed down in connection with said transaction, in the District Court of the United States for the Eastern District of Missouri, and take no further proceedings, criminal or civil, against any party or interest.

Any error in computation, either in your favor or in ours, will be adjusted.

Attached to the foregoing letter was a cashier's check issued by the Riggs National Bank of Washington, D. C., in words and figures as follows (Defendant's exhibit 19, made a part hereof by reference):

Cashier's
Check WASHINGTON, D. C., *Jan. 9, 1935.* No. 95781

THE RIGGS NATIONAL BANK 15–3
of Washington, D. C.

Pay to the
order of R. S. PRUITT, VICE PRESIDENT, AVIATION CORPORATION * * * * * * * * * * $349,532.34

Riggs, Nat'l Bank $349,532. & 34 Cts. DOLLARS

H. G. HOSKINSON,
Vice President.

The aforesaid check was not endorsed.

13. On January 21, 1935, the Attorney General, through Frank J. Wideman, Assistant Attorney General, addressed the following communication to R. S. Pruitt:

> Reference is made to your letter of January 9, 1935, tendering the sum of $349,532.34 in full settlement of all civil and criminal liability arising from the income taxes of the Universal Aviation Corporation for the period January 1 to August 1, 1929.
>
> The cashier's check on The Riggs National Bank of this city, to your order, was not endorsed.
>
> It is, however, being held in this office.
>
> The matter will have careful consideration and you will be duly advised. It is deemed only fair to state, however, that in the event of a rejection of the offer the fact that such an offer has been made will not interfere with the preparation of the case for trial on February 18, 1935.

14. On February 4, 1935, R. S. Pruitt, General Counsel of The Aviation Corporation, addressed the following letter to Frank J. Wideman, Assistant Attorney General:

> This will acknowledge receipt of your letter of January 21, 1935.
>
> The Cashier's check on The Riggs National Bank was not endorsed by me because the Attorney General expressly stated that he did not desire to have same endorsed until it was decided whether the offer would be accepted or not. I will be in Washington on Thursday of this week at the Mayflower Hotel, and assume that by that time a decision will be reached. If you then desire to have me endorse the check and will leave a message at the Mayflower, I will be glad to call to see you.

15. On July 9, 1935, R. S. Pruitt, Vice President of The Aviation Corporation, addressed the following communication to Honorable Homer S. Cummings, Attorney General:

> On January 9, 1935, I called to see you at your office in Washington accompanied by Mr. Basil O'Connor, representing Mr. William Dewey Loucks, one of the defendants in the proceeding entitled *United States* v. *Dan W. Jones, et al.*, pending in the United States District Court at St. Louis, Missouri. At that conference, I tendered to you a cashier's check on the Riggs National Bank of Washington, D. C., payable to my order, in the amount of $349,532.34, in full settlement

of all civil and criminal liability arising from the income taxes of the Universal Aviation Corporation for the year 1929. You stated that the matter would be investigated and that you would let me know within a short time whether you desire to accept said check in full settlement or return same to me, and it was agreed that if you decided to accept said check, I would come to your office and enforce the same in order that it might be cashed by the Commissioner of Internal Revenue.

Subsequently, under date of January 21, 1935, I received a communication from Frank J. Wideman, Assistant Attorney General, advising that the offer in settlement would receive careful consideration and that I would be duly advised of the decision of the Department of Justice, but that in the event of a rejection of the offer the fact that such an offer had been made would not interfere with the preparation of the case for trial on February 18, 1935. Subsequently the hearing of the case on February 18, 1935, was continued and on inquiry you advised me again that the matter was being further considered and that I would shortly be advised of your decision.

I am now of the opinion that a sufficient length of time has elapsed to permit a full investigation of the questions of civil and criminal liability involved and to enable you to reach a decision. During this period of six months, The Aviation Corporation has lost the interest on the sum of $349,532.34 which it expended to purchase the cashier's check tendered to you, and this offer cannot be held open any longer. I am, therefore, writing this letter to state that The Aviation Corporation withdraws its offer of settlement and to request you to return to me the check on the Riggs National Bank above referred to, which was left with you on January 9, 1935, and which you have not accepted in full settlement in accordance with our tender.

16. On August 13, 1935, R. S. Pruitt, Vice President and General Counsel of The Aviation Corporation, addressed the following letter to the Honorable Homer S. Cummings, Attorney General:

On July 9th I wrote you withdrawing the offer of The Aviation Corporation to pay the sum of $349,532.34 in full settlement of corporate income taxes, interest and penalties claimed to be due from The Aviation Corporation or its subsidiary, Universal Aviation Cor-

poration, on account of the sale of certain stock of the Fokker Aircraft Corporation in 1929 and in full settlement of civil and criminal liabilities of the officers and directors of the Company for which certain individuals were indicted at St. Louis, Missouri. I asked you to return to me the cashier's check payable to my order which I left with you when this offer of settlement was made on January 9, 1935.

I have had no reply to my letter of July 9 and the check has not been returned to me but am now informed that your Department wishes further time to consider the offer and desires that the offer be renewed.

I am, therefore, withdrawing my letter of July 9 and subject to your immediate acceptance again tendering to you the cashier's check for $349,532.34 in full settlement of all civil and criminal liabilities of The Aviation Corporation, Universal Aviation Corporation and the officers and directors of said companies arising out of said Fokker stock transaction and in accordance with the terms and conditions outlined in my letter of January 9, 1935, which I delivered to you with the check.

This offer is subject to your immediate acceptance and unless accepted by you on or before September 1, 1935, will be withdrawn and unless you do accept the offer it is, of course, desired that the check be returned to me. If on the other hand you decide to accept the offer, I will come to Washington upon receipt of your acceptance and endorse the check so that same may be cashed by the Collector of Internal Revenue.

17. On August 27, 1935, the Attorney General, through Frank J. Wideman, Assistant Attorney General, addressed a letter to Harry C. Blanton, Esq., United States Attorney, St. Louis, Missouri, advising him that on August 26, 1935, the Attorney General had approved a settlement submitted by the plaintiff "upon the condition that the court be fully informed so that it may have opportunity to interpose any objection it may deem proper; and, in the event objection is so interposed the acceptance not to be effective." The letter further advised that Mr. William H. Boyd, Special Assistant to the Attorney General, would come to St. Louis for the purpose of making an appropriate statement to the court and moving that an order of nolle prosequi be entered.

18. On August 27, 1935, the Attorney General, through Frank J. Wideman, Assistant Attorney General, addressed

the following letter to Raymond S. Pruitt, Esq., The Aviation Corporation:

> Further reference is made to your letter of January 9, 1935, enclosing a check to your order as Vice President of The Aviation Corporation, for $349,532.34, which was tendered by you in full settlement of the tax liability against The Aviation Corporation as transferee of Universal Aviation Corporation, with respect to the income taxes of the latter for the year 1929. Your offer was submitted upon the understanding that the indictments heretofore handed down in connection with said tax in the District Court of the United States for the Eastern District of Missouri would be dismissed, and that the Government would take no further proceedings, criminal or civil, against any party or interest. Reference is also made to your letter of July 9, 1935, withdrawing the said offer, and to your further letter of August 13, 1935, withdrawing the letter of July 9th and reinstating the offer subject to acceptance on or before September 1, 1935.
>
> Upon careful consideration the Attorney General has accepted the offer upon the condition that the court be fully informed so that it may have opportunity to interpose any objection it may deem proper to the entry of orders of nolle prosequi and, in the event the objection is so interposed, the acceptance is not to be effective.
>
> The United States attorney has been advised of the present status of the matter and has been requested to inform this office when the matter can be presented to the court, in order that a representative of this office may be present to make such presentation.
>
> As soon as a definite date is fixed, you will be advised.
>
> In this connection it is to be noted that the check of $349,532.34 requires your endorsement. It is believed that if arrangements can be made for you to be present in St. Louis when the matter is submitted to the court this should be done, in order that you may then and there endorse the check so that it can be delivered by the representatives of this office to the Collector of Internal Revenue.

19. On September 10, 1935, William H. Boyd, Special Assistant to the Attorney General, appeared before the United States District Court in St. Louis and moved the Court to enter an order of nolle prosequi as to the indictments. Among other persons in court at the time were Raymond S. Pruitt, Vice President and General Counsel of

The Aviation Corporation and Howard Kondolf, Secretary of the corporation. Thereupon the court made inquiry as to whether anyone present had objection to the entry of the order, and receiving no response to the inquiry, the motion was granted. Thereafter, R. S. Pruitt endorsed the Cashier's check referred to in Finding 12 and turned the check over to Mr. William H. Boyd. The check was placed in the Collector's 9–D account in the office of the Collector of Internal Revenue, St. Louis, Missouri.

20. On September 16, 1935, the Attorney General, through Frank J. Wideman, Assistant Attorney General, addressed the following communication to Raymond S. Pruitt, Esq.:

> Reference is made to your letter of January 9, 1935, tendering the sum of $349,532.34 in settlement of the tax, with interest and 50% penalty against The Aviation Corporation as transferee of Universal Aviation Corporation for the year 1929.
>
> As you have previously been advised, the offer was conditionally accepted by the Attorney General. On September 10, 1935, the indictments pending in the United States District Court at St. Louis, Missouri, against Dan W. Jones et al. were upon motion of this department dismissed. The Court at that time interposed no objections to the settlement and therefore the acceptance of the Attorney General made August 26, 1935, became final.
>
> Your letter of January 9, 1935, stated that "any error in computation either in your favor or in ours, will be adjusted." The contention [sic] of the Bureau of Internal Revenue is being called to this in order that it may determine whether there are any adjustments to be made.
>
> As requested by you in St. Louis, there is enclosed a copy of the motion for entry of an order of nolle prosequi of the criminal cases, with supporting statement of the reasons therefor.

21. On September 16, 1935, the Attorney General, through Frank J. Wideman, Assistant Attorney General, addressed the following letter to the Honorable Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, portions of which are here set forth:

> References is made to your letter of August 24, 1935, relative to the proposed settlement of the above-entitled case.

This letter had reference to an offer submitted by Raymond S. Pruitt, Esq., as Vice President and General Counsel of The Aviation Corporation, tendering the sum of $349,532.34 in settlement of the liability of The Aviation Corporation for income taxes, interest, and 50% penalty due from his corporation as transferee of the Universal Aviation Corporation for 1929. This offer was submitted upon the understanding that the pending indictments in St. Louis would be dismissed and that no further proceedings, criminal or civil, would be undertaken.

* * * * *

Inclosed are copies of letters to Mr. Pruitt, Samuel B. Pack, and James E. Carroll, representing the defendants, advising them of the acceptance.

As will be noted from a copy of the letter of Mr. Pruitt, dated January 9, 1935, tendering the settlement, he contemplated that any error in computation either in favor of the Government or taxpayer, would be adjusted. It is suggested that you give consideration to this to determine whether or not any adjustments are in order. In the meantime, the case is being considered closed in this Department subject to being reopened for the purpose of making any adjustments which may appear to be desirable.

22. On October 17, 1935, Guy T. Helvering, Commissioner of Internal Revenue, addressed the following letter to the Honorable Frank J. Wideman, Assistant Attorney General:

Reference is made to your letter dated September 16, 1935, advising the Bureau of an acceptance of an offer in compromise of the above-entitled case for 1929. The amount offered was $349,532.34 and was comprised of a tax of $195,378.60, a penalty of $97,689.30, and statutory interest to and including January 1935.

It appears the settlement comprehended that the amount offered should be adjusted for any change in the amount of tax, penalty, or interest found to be due by the Bureau and your letter indicates that you desire to be informed of any such change.

A recomputation has been made by the Income Tax Unit and the actual amount found to be due is $350,272.54, which is comprised of a tax of $195,798.36, a penalty of $97,899.18, and statutory interest of $56,575.00.

23. On November 13, 1935, the Attorney General, through Frank J. Wideman, Assistant Attorney General, addressed the following letter to R. S. Pruitt, Esq., Vice President, The Aviation Corporation:

> Reference is made to your letter of January 9, 1935, tendering a check for $349,532.34 in settlement of the tax liability of the Universal Aviation Corporation for the portion of the calendar year 1929 expiring August 1, 1929. The amount paid by you represented $195,378.60 tax, with penalties of $97,689.30 and interest at 6% on the tax from March 15, 1930, to and including January 8, 1935.
>
> In your letter it was stated that "any error in computation, either in your favor or in ours, will be adjusted."
>
> As you have been previously advised, the offer in compromise was accepted by the Attorney General and the criminal proceedings incident thereto were dismissed.
>
> The Commissioner of Internal Revenue has now advised this office that there are slight adjustments to be made in the tax liability by reason of the fact that the tax as recomputed is $195,798.36, with a corresponding increase in the penalty to $97,899.18. This will also result in a slight increase in the interest. There is enclosed a copy of the recomputation of net income and tax liability made in the Bureau.
>
> The figures result in an additional tax of $419.76 and penalty of $209.88, and the interest is $131.31, making a total due of $760.95.
>
> In view of the above quoted provision in your offer of settlement, it is requested that you forward to this office a check for the additional amount due, which check can be drawn to the order of the Commissioner of Internal Revenue.

24. On November 26, 1935, R. S. Pruitt, Vice President and General Counsel of The Aviation Corporation, addressed the following communication to the Attorney General:

> In accordance with your request of November 13, 1935, I am enclosing herewith check of The Aviation Corporation to the order of the Collector of Internal Revenue, in the amount of $760.95, in full settlement of the balance of tax, interest, and penalties due from the Universal Aviation Corporation.

25. On November 30, 1935, the Attorney General, through Frank J. Wideman, Assistant Attorney General, addressed the following letter to R. S. Pruitt, Esq., Vice President, The Aviation Corporation:

> Receipt is acknowledged of your letter of November 26, 1935, enclosing check of The Aviation Corporation for $760.95, representing the balance due for income taxes, penalties, and interest of the Universal Aviation Corporation for 1929, as computed in letter from this office of November 13, 1935.

26. On November 30, 1935, the Attorney General, through Frank J. Wideman, Assistant Attorney General, addressed the following letter to the Honorable Guy T. Helvering, Commissioner of Internal Revenue:

> Reference is made to your letter of October 17, 1935, stating that recomputation of the income tax liability of Universal Aviation Corporation for 1929 showed a slightly different amount from that paid by The Aviation Corporation in settlement. There is now enclosed a check of the latter corporation for $760.95 representing additional tax of $419.76, penalty of $209.88, and interest of $131.31.
>
> With the application of these amounts to the liability, this Department considers the entire case closed.

27. On the income-tax assessment list for the month of April 1936, First Missouri District, the Commissioner of Internal Revenue made an assessment against the Universal Aviation Corporation in the amount of $350,293.29, covering the payments made by The Aviation Corporation in accordance with the compromise agreement.

28. On or about August 26, 1937, the Aviation Corporation (as transferee of Universal Aviation Corporation) filed a claim for refund in the amount of $350,293.29, stating the following grounds therefor:

> The following are assigned as the reasons why this claim should be allowed:
>
> 1. The Commissioner of Internal Revenue erred in including in the income of Universal Aviation Corporation a profit on the sale of Fokker stock of $2,248,000 which taxpayer contends was properly included in the consolidated return of The Aviation Corporation. Said

profit did not accrue to Universal Aviation Corporation until after consolidation had been effected between the companies.

2. At the time of the sale of the Fokker stock by Universal Aviation Corporation to The Aviation Corporation, Universal Aviation Corporation was in the process of a tax-free reorganization under the terms and conditions of the Revenue Act of 1928, on an exchange of stock of Universal Aviation Corporation for stock of The Aviation Corporation, and by reason of such tax-free reorganization no tax attached to the transaction involved in the sale of the Fokker stock, and there was no profit in such sale by reason of such tax-free reorganization and intercompany affiliation.

3. The original attempted sale of Fokker stock by Universal Aviation Corporation to The Aviation Corporation was not consummated, and the transaction in its entirety was rescinded and in substitution thereof a loan was made by The Aviation Corporation to Universal Aviation Corporation of an amount equal to the eventual purchase price of the Fokker stock, with the Fokker stock as collateral for such loan, with the option to The Aviation Corporation to take the Fokker stock at the price the loan, which eventually it did, but only after it had acquired 100%, or practically 100%, of the stock of Universal Aviation Corporation in the process of the tax-free reorganization of Universal Aviation Corporation, whereby its stock was exchanged for stock of The Aviation Corporation.

4. Even if the sale of Fokker stock by Universal Aviation Corporation to The Aviation Corporation had been made with a resultant paper profit of $2,248,000, by due and proper and legal corporate action during the taxable year, such transaction was rescinded and in place and instead thereof a loan was made by The Aviation Corporation to Universal Aviation Corporation of an amount equal to the price of such Fokker stock, with the Fokker stock as collateral thereto, with the right to The Aviation Corporation to, at any time, take the stock at the price of the loan and cancel the loan, which The Aviation Corporation elected to do, but only after it had acquired approximately 100% of the stock of Universal Aviation Corporation in the process of the tax-free reorganization of Universal Aviation Corporation.

5. That under any conception of the Revenue Act of 1928, a transferee is not liable for penalties, and in the amount of $350,293.29 paid as aforesaid, $97,899.19 con-

stituted a penalty, for which The Aviation Corporation, as such transferee, was in no way liable, and which penalty against such transferee could in no way be enforced, Universal Aviation Corporation having been legally dissolved.

6. That under any conception of the Revenue Act of 1928, a transferee is not liable for interest, and in the amount of $350,293.29 paid as aforesaid, $56,595.75 was paid as interest, for which The Aviation Corporation as such transferee was in no way liable, and which interest against such transferee could in no way be enforced, Universal Aviation Corporation having been legally dissolved.

7. That the entire alleged tax, interest, and penalties were barred by the Statute of Limitations at the time of the enforcement of payment, more than three years having elapsed from the date of the return complained of, which was filed on June 15th, 1930, and in the absence of fraud no income tax, penalty and/or interest could be enforced against Universal Aviation Corporation or its transferee, The Aviation Corporation, and no fraud occurred in relation to the transactions.

8. That The Aviation Corporation, as transferee of Universal Aviation Corporation, was coerced and forced into making the payment of $350,293.29, for the reason that the alleged claim for tax, interest, and penalties having been barred by the Statute of Limitations, the only way that the Government could seek to enforce the same was to claim fraud in connection therewith, and in order to intimidate The Aviation Corporation and force an adjustment and payment of such alleged tax, interest and penalties, Governmental authorities caused indictments to be found, predicated upon the transactions above referred to, alleging conspiracy and fraud, against the President, Treasurer, General Counsel, and certain other officers and agents of The Aviation Corporation, alleging a fraudulent income tax return in relation to the transaction involving the sale of said Fokker stock, and by the use of such processes and acts forced The Aviation Corporation to pay the said sum of $350,-293.29 on such alleged liability, when there was no tax liability whatsoever, and even if there had been a tax liability, the same could not have been enforced by reason of the Statute of Limitations, there being no fraud in the transaction whatsoever, but in order to save such officers, counsel, and employees from the indignity and expense of trial under said indictments, The Aviation

Corporation could only obtain the dismissal of such indictments by the payment of said sum of $350,293.29.

9. Said tax was collected from claimant in violation of the statutes providing for the determination of a deficiency and allowing claimant an appeal to the Board of Tax Appeals. Hence its collection was illegal. Furthermore, the Commissioner of Internal Revenue had made no assessment against claimant, and there were no civil or criminal proceedings pending against the claimant, and the statute of limitations barred any such proceeding at the time the aforesaid tax was paid.

10. A further and additional ground of this claim is that the United States has received from the claimant money which in equity and good conscience it ought not to retain, and this general count is filed for the return thereof.

29. On September 7, 1937, Harold Kondolf, Vice President of The Aviation Corporation, addressed the following letter to the Commissioner of Internal Revenue:

Reference is made to our claim for $350,293.29 for the period from January 1, 1929, to August 1, 1929, which was filed with you on August 26, 1937.

In connection with this claim we desire you to consider in addition to the points made in the claim, or as a supplement thereto and a part thereof, the following points:

(1) There could have been no taxable profit on this transaction in any event because the sale (even if made) was rescinded within the taxable period. The law provides for the computation of taxes on an annual basis or on the basis of a fiscal period and the taxable period in its entirety is regarded as a unit of time. *Burnet* v. *Sanford & Brooks*, 283 U. S. 359. In other words, the same taxable period cannot be split into parts. If a sale is made during a taxable period but is rescinded and annulled in the same taxable period, there is no profit from the sale, which is returnable. Everything that took place during the period must be regarded together. It cannot be split into parts. See *Bassick* v. *Commissioner*, 85 F. (2d) 8, at page 10.

Furthermore, even if the making of a sale could be considered as the unalterable accrual of a profit, it would follow that the recission of the same sale would give rise to a deductible loss of the same profit.

(2) If it be suggested by the Government in its defense that the tax is not recoverable because of an

alleged compromise, we say that this is untenable for the following reasons, among others:

In the first place, where there is no tax liability in fact there can be no basis for a compromise. This was held by the Court of Claims in the case of *W. Forbes Morgan* v. *United States*, 8 F. Supp. 746.

In the second place, there could have been no compromise in this case because the Supreme Court plainly stated in *Botany Worsted Mills* v. *United States*, 278 U. S. 281, that the provisions of the Revised Statutes authorizing the making of a compromise must be strictly complied with. This statute does not confer on the Attorney General a power to compromise any case and any Executive Order which attempts to confer this power on the Attorney General is an attempt to amend the law by the Executive. This can only be done by Congress. Furthermore, the order on which you rely is not applicable to the case of this company.

Anything which you might construe as an offer in compromise is hereby withdrawn. * * *

30. On April 14, 1938, the Bureau of Internal Revenue addressed the following letter to The Aviation Corporation as transferee of Universal Aviation Corporation:

> Your claim for refund of $350,293.29 for the period January 1, 1929, to August 1, 1929, has been examined and will be disallowed for the reason that your tax liability for this year has been settled by compromise.
>
> Official notice of the disallowance of the claim will be issued by registered mail in accordance with the provisions of Section 1103 (a) of the Revenue Act of 1932.

The claim was officially rejected on May 27, 1938.

31. On May 2, 1940, the Commissioner of Internal Revenue addressed the following letter to John E. Hughes, Counsel for The Aviaion Corporation:

> Further reference is made to your letter of December 13, 1939, regarding the petition of the above-named corporation to reopen a claim for refund in the amount of $350,293.29, covering income tax for the period January 1, 1929, to August 1, 1929, and penalty and interest in connection therewith. This petition, executed on December 13, 1939, was received in the Bureau on December 23, 1939.
>
> The records of this office indicate that this case was referred to the Department of Justice and was settled by that Department on September 9, 1935. A claim for

refund of the amount paid pursuant to this settlement was filed by The Aviation Corporation on September 3, 1937. Upon the advice of the Department of Justice, this office on May 27, 1938, transmitted to that corporation by registered mail a formal rejection of its claim. The petition now under consideration requests the reopening and allowance of that claim.

Section 5 of Executive Order 6166, promulgated June 10, 1933, pursuant to an Act of Congress of March 3, 1933, Pub., No. 428 (47 Stat. 1517, Sec. 16), vests jurisdiction in the Department of Justice of cases referred to it for prosecution or defense. Since, as indicated above, this case was referred to and settled by that Department and the claim for refund was rejected pursuant to its recommendation, the petition to reopen the refund claim is denied.

The court decided that the defendant's Plea in Bar should be sustained and the plaintiff's petition dismissed.

JONES, *Judge*, delivered the opinion of the court:

This is a suit to recover income tax, penalty and interest levied against the plaintiff, The Aviation Corporation, as transferee of the assets of the Universal Aviation Corporation. The levy was based upon the profits arising from an alleged sale to plaintiff by the Universal Aviation Corporation of stock which it held in the Fokker Aircraft Corporation of America.

Briefly the general facts are as follows:

The Universal Aviation Corporation was organized in 1928. On May 16, 1929, it sold 50,000 shares of the capital stock of the Fokker Company to the plaintiff for a profit of $2,248,000. The plaintiff company was organized March 1, 1929. During the month of August 1929 it completed the acquisition of more than 95% of the stock of the Universal Aviation Corporation. On March 15, 1930, the Universal Aviation Corporation and subsidiaries filed a tentative income tax return for the period January 1 to August 1, 1929, and on May 15, 1930, a final return, showing a net loss for that period. In making its return it failed to report the sale of the stock of the Fokker Company. On June 1, 1934, the Commissioner of Internal Revenue recommended to the Department of Justice the institution of criminal proceedings against 8 men who at the time of the transaction were

officials of either the plaintiff company or the Universal Aviation Corporation.

On June 20, 1934, two indictments were returned, one against Halsey Dunwoody and George B. Schierberg, charging them with attempting to defeat and avade income taxes of the Universal Aviation Corporation for the period January 1 to August 1, 1929, and a second indictment against 6 other men named, charging them with conspiracy to evade and defeat the income taxes of the Universal Aviation Corporation for the same period.

A short time later a compromise settlement was suggested to the Bureau of Internal Revenue. Then followed correspondence and conferences between various attorneys of the parties at interest, including plaintiff, and officials of the Department of Justice and the Bureau of Internal Revenue in reference to the settlement of the civil as well as any criminal liability. Apparently the first offer, in the amount of $75,000 in compromise of all civil and criminal liability, was made by the attorneys for defendant Loucks. The assistant general counsel for the Bureau of Internal Revenue declined to recommend this settlement to the Department of Justice.

On January 9, 1935, R. S. Pruitt, Vice President of The Aviation Corporation, addressed a letter to the Hon. Homer S. Cummings, Attorney General, to which he attached cashier's check in the sum of $349,532.34, which was tendered in full settlement of all civil and criminal liability arising from the income taxes of the Universal Aviation Corporation for the year 1929. It was stated that any error in computation in favor of either party would be adjusted.

After considerable further correspondence the offer was accepted, the check was endorsed to the Collector of Internal Revenue and the indictments were dismissed September 17, 1935. Later upon computation by the Bureau of Internal Revenue it was found that the amount of the tax, interest and penalty should be $760.95 additional, which on November 26, 1935, was sent to the Attorney General in the form of a check by The Aviation Corporation, payable to the order of the Collector of Internal Revenue. Receipt was

acknowledged by the Attorney General on November 30, 1935, and on the same date the Attorney General addressed a letter to the Commissioner of Internal Revenue, enclosing the check and stating "with the application of these amounts to the liability this Department considers the entire case closed."

On August 26, 1937, the plaintiff, The Aviation Corporation, filed a claim for refund in the amount of $350,293.29.

Various grounds are set out in the application and discussed in plaintiff's brief in behalf of the application for a refund.

The defendant contends that all the questions in the case are foreclosed and disposed of by the offer and acceptance of the payment specified in compromise of all civil an criminal liability, both pending and otherwise arising out of the facts of the case. It therefore enters a Plea in Bar.

To this plea of compromise settlement the plaintiff makes several defenses. It first asserts that the Attorney General had no authority under the law to make a compromise settlement, but that the Commissioner of Internal Revenue alone had such authority.

We disagree. The Act of June 30, 1932 (U. S. C. Title 5, Section 124), authorizes the President to transfer the whole or any part of any executive agency or the functions thereof to the jurisdiction and control of any other executive agency, and to designate and fix the name and functions of any consolidated activity or executive agency and the title, powers, and duties of any executive head.

By the terms of section 5 of Executive Order No. 6166[1] (U. S. C. Title 5, Sec. 132), the function of prosecuting in the courts of the United States claims and demands by and offenses against the Government of the United States

[1] The pertinent part of Section 5 of Executive Order No. 6166 is as follows:

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

and of defending claims and demands against the Government, then exercised by any agency or officer were transferred to the Department of Justice, together with the function of deciding whether and in what manner to prosecute, or to defend, or to compromise, or to abandon prosecution, theretofore exercised by any agency or officer.

We think that under this Order, if not under his general powers, the Attorney General had authority to settle both the civil and criminal liabilities arising out of the transactions in question,[2] especially since he collaborated with the officers of the Bureau of Internal Revenue, was acting on their request and conferring with them, and since that Bureau had had direct correspondence with officials of the plaintiff and had approved and ratified the compromise and accepted the check in settlement.

This conclusion is further strengthened by the recodification act which showed interpretation by the Congress of the existing law as conferring upon the Attorney General the authority to compromise any civil or criminal case arising under the internal revenue laws.[3]

The plaintiff next asserts that the deal was not in fact a sale but an intercompany transaction, upon which no income liability was incurred; that it later procured more than 95% of the stock of hte Universal Aviation Corporation, changed the sale to a loan for the full amount of the purchase price with option to purchase, which option was later exercised, thus changing the entire transaction, and that there was therefore nothing to compromise.

This contention cannot be sustained. The sale was completed in May 1929. The agreed price was $53 per share. The original purchase price of the stock when acquired by the Universal company was $8 per share. Some time later the acquisition by plaintiff of the major portion of the stock of the Universal Aviation Corporation was completed, and the books were changed to show, instead of a sale, a loan for the full amount of the purchase price with option to purchase, which option was exercised on September 4, 1929.

[2] *Duncan* v. *United States*, 39 Fed. Sup. 962, 964 (W. D. Ky.).
[3] U. S. C. Title 26, Section 3761.

This same point was presented in the District Court of the United States for the Eastern District of Missouri on demurrer to the indictments in the *Jones et al.* case, *supra*, (see finding 9). In overruling the demurrer, the court said:

> * * * But, I repeat, I am not able to see how a taxpayer may, after finally consummating a sale in which there is taxable profit, attempt to rescind such fully consummated sale and then "doctor" his books and minutes and records, so as to show a wholly false situation.
>
> While the case is unique in legal annals, it is yet so shot through with immoral trickery, that if it is not a criminal offense, it ought to be, and I think it is.

The plaintiff also contends that since the full amount of the tax liability, including penalty and interest, was paid, there was no compromise, and that the payment of such liability in full negatived the possibility of the transaction being treated as a compromise. In making this point it overlooks the fact that the plaintiff's own proposal as outlined by its vice president covered not only any alleged tax liability, but also full settlement and dismissal of the indictments, and the further agreement that the defendant would take no further proceeding, criminal or civil, against any party at interest. The entire record bears out this understanding.

Plaintiff further contends that the use of the expression in the compromise offer to the effect that any error in computation in favor of either party would be adjusted evidenced an intention to leave the entire question open as to whether there was any tax liability. This, too, is negatived by the record. Plaintiff, being uncertain as to just how the amount should be calculated, submitted the results of two different methods of calculation, differing slightly in their totals. The defendant insisted that the calculation must be made by the Bureau of Internal Revenue. It is evident that the reference to adjustment was inserted not for the purpose of leaving open the question of tax liability but to provide for the correction of any errors in computation.

Plaintiff further contends that it had no interest in this transaction, that the indictments were against individuals

who were no longer officials of plaintiff company and that the Universal Aviation Corporation had been dissolved in 1931, and the tax liability, if any, was that of the Universal Corporation and not that of the plaintiff.

Plaintiff was the transferee of the assets of the Universal company and took such assets subject to its legal obligations. Several of the indicted officials were officials of either the Universal Corporation or the plaintiff company at the time the transaction occurred. The record is silent as to whether they had disposed of their stock in the corporation. The officials of the plaintiff company participated in the negotiations for a settlement. The facts as a whole tie the parties in interest so closely that it is rather illogical to say that plaintiff had no interest in the compromise settlement. Besides, it would not be necessary for it have a direct financial interest in order that there might be consideration for the compromise settlement. Consideration may mean an advantage flowing to one party or a loss that is occasioned to the other. If by the payment of a compromise settlement the plaintiff induced the defendant to waive rights or asserted rights, both criminal and civil, against other parties, it would be estopped from asserting failure of consideration and thus securing the return of moneys paid. Such act had induced the defendant to waive its claim until limitation had run in favor of all other parties and thus until its claim to any rights had been sacrificed.

Even if it were conceded that plaintiff company has no financial interest in the transaction, it would, there being no duress, then place itself in the position of a volunteer, which would prevent recovery.[4]

It is claimed that the payments were made under duress. This claim is rather incongruous with the claim that it had no interest whatever in the transaction. It is difficult to see how there could have been duress if there was no interest. While we do not approve of the practice of instituting criminal proceedings as a strong-arm method of collecting taxes, we think the facts in this case go much further than that. We find there was no duress. Not only

[4] *Aaron* v. *Hopkins, Collector*, 63 Fed. (2d) 804; *Clift & Goodrich* v. *United States*, 56 Fed. (2) 751, 753.

was the initiative in the move to secure a settlement taken by the attorneys for the individuals who were indicted, but the negotiations were participated in by the officials of the plaintiff. The plaintiff quotes from defendant's motion to dismiss the indictments a sentence which when standing alone would indicate that the criminal cases were not compromised; however, when the paragraph is read as a whole, it is manifest that all phases of the case, both civil and criminal, were included in the compromise. This was also borne out by the testimony and documents filed as evidence.

Plaintiff's defenses are based upon a tier of technicalities which we are unable to surmount. Its position is fictionized upon a cushion of legality that will not bear analysis in the light of the facts of record.

Whatever may be the merit of any of these defenses, however, they are disposed of by the consummation of the compromise settlement.[5]

An outright sale of the Fokker stock was made in May 1929. Some three months later the plaintiff secured a large percentage of the stock of the Universal Corporation. It changed the books of that company to show a loan in the same amount as the purchase price, exercising the option to purchase in September 1929. Then it made an income tax return reporting the same as a nontaxable intercompany deal, the Universal company failing altogether to report the sale.

An audit by the Internal Revenue Bureau some time later disclosed the transaction and the failure of the Universal company to report the sale. The Internal Revenue Bureau referred the matter to the Department of Justice with a recommendation that the officials be indicted. This was done. Demurrers to the indictments were overruled and the attorneys for the indirected officials, as well as officials of the plaintiff company, began negotiations for a compromise settlement of both the civil and criminal liability. The first definite offer that is disclosed by the record is the suggestion that $75,000 be paid in settlement of both the civil and criminal liability. The Bureau of Internal Revenue

[5] *Castle* v. *United States*, 84 C. Cls. 300, 311; *Shantz* v. *United States*, 23 C. Cls. 384, 398; *Du Puy* v. *United States*, 67 C. Cls. 348, 378, 379; *Walker* v. *Alamo Foods Co.*, 16 F. (2d) 694.

was requested to check over this offer and see if it could not recommend such a compromise. It did so and rejected the offer. The Department of Justice at first insisted upon full payment of tax, penalty and interest, plus pleas of guilty on the part of the indicted officials. Later, after repeated conferences, a compromise was agreed upon which was much more than plaintiff's original offer, but which included less than was originally demanded by the Department of Justice. The tax, including penalty and interest, was paid in full and all the indictments were dismissed, and it was agreed that there would be no further proceedings civil or criminal. Clearly this was a compromise agreement, the negotiations for which had been participated in by attorneys for all parties, as well as by officials of the Bureau of Internal Revenue. It was accepted and ratified by all the parties, including the Bureau of Internal Revenue, which approved the settlement, made the necessary formal levies and cashed the check. The case was then reported closed.

We find that there was a fully authorized compromise settlement of the entire matter; that the defendant's Plea in Bar should be sustained, and the petition dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

ALICE S. KEEFE, GERTRUDE S. KEEFE, AND MARY R. KEEFE v. THE UNITED STATES

[No. 45518. Decided October 5, 1942]*

On the Proofs

Estate tax; policies issued prior to passage of 1918 Revenue Act; right to change beneficiaries.—Where the insured, decedent, at all times until the date of his death, August 3, 1935, had the right and power to change the beneficiaries or their interests under the terms of certain life-insurance policies taken out by decedent on his life prior to the passage of the Revenue Act

*Plaintiffs' petition for writ of certiorari denied by the Supreme Court March 1, 1943.

of 1918; and where such power was exercised by decedent in 1930 and 1932; it is *held* that the proceeds of such policies in excess of $40,000 were subject to estate tax under the provisions of section 302 (g) and 302 (h) of the Revenue Act of 1926 (44 Stat. 9) and plaintiffs, legatees, are not entitled to recover.

Same.—The facts in the instant case are sufficient to distinguish the case from the cases of *Lewellyn* v. *Frick*, 268 U. S. 238; *Bingham* v. *United States*, 296 U. S. 211, and *Industrial Trust Co. et al., executors*, v. *United States*, 296 U. S. 220; and the instant case comes within the principles announced and applied in *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Chase National Bank et al.* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, and *Helvering* v. *Hallock*, 309 U. S. 106.

Same; change of beneficiary.—Where the decedent in 1930 and 1932 exercised his right of ownership and control over insurance contracts issued prior to the passage of the Revenue Act of 1918, and changed the beneficiaries and their interests previously created; it is *held* that the decedent thereby created interests in the proceeds of such policies to which the provisions of the then existing estate tax act expressly attached, and, therefore, the provisions of said existing estate taxing statute are not retroactive as applied to such proceeds. *Chase National Bank et al.* v. *United States*, 278 U. S. 327; and *Bailey* v. *United States*, 90 C. Cls. 644 cited.

The Reporter's statement of the case:

Mr. Richard F. Canning for the plaintiffs. *Mr. Andrew P. Quinn* was on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiffs, who were until March 15, 1937, the executrices under the will of John W. Keefe, and who since that time and now are the residuary legatees under the will, seek to recover $6,332.22, being the amount not barred by the statute of limitation of an alleged overpayment of estate tax in the amount of $8,306.34.

The question presented is whether the proceeds in excess of $40,000 of certain life insurance policies taken out by the decedent on his own life prior to the passage of the Revenue

Act of 1918 are includible in his gross estate for the purpose of determining the net estate subject to the tax. The insured changed the beneficiaries or their rights under all of the policies after the passage of the Revenue Act of 1918, and died August 3, 1935.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiffs are citizens of the United States and residents of the State of Rhode Island, and bring this action in their own right.

2. John W. Keefe died testate August 3, 1935, and was at and before the time of his death a citizen of the United States and a resident of the State of Rhode Island. August 19, 1935, plaintiffs were duly appointed by the Probate Court of the Town of Narragansett in the State of Rhode Island, and qualified as, executrices under the will of John W. Keefe. January 29, 1937, plaintiffs filed in said Probate Court their first and final account as such executrices, which account was allowed by said court March 15, 1937, and plaintiffs were discharged as such executrices by said court. The plaintiffs were the residuary legatees under the will of John W. Keefe and are entitled to receive 33⅓% each of the amount sought to be recovered in this action.

3. August 3, 1936, plaintiffs filed as such executrices an estate tax return showing a tax liability, under the Revenue Act of 1926 and the Revenue Act of 1932 as amended by the Revenue Act of 1934, of $14,037.33, which sum was, on August 3, 1936, paid by plaintiffs as such executrices. Thereafter plaintiffs, individually, paid additional sums in payment of deficiencies in estate tax asserted by the Commissioner of Internal Revenue, with interest from August 3, 1936, as follows:

June 5, 1937—$589.23, with interest of $20.62.
Aug. 25, 1937—$2,504.37, with interest of $159.36.
Oct. 8, 1937—$3,425.34, with interest of $243.20.

4. October 22, 1937, plaintiffs filed a claim for refund in the sum of $3,668.54 alleging as grounds therefor that the Commissioner had improperly included in the gross estate, upon which the tax had been paid, *the following:*

Reporter's Statement of the Case

1. Proceeds of policy No. 7[illegible]935—State Mutual Life Assurance Company	$10,070.30
2. Proceeds of policy No. 85709—State Mutual Life Assurance Company	15,116.00
	25,186.30

5. Thereafter on December 31, 1937, the Commissioner mailed to plaintiffs, by registered mail, notice that said claim for refund had been rejected. February 23, 1938, plaintiffs brought action in the United States District Court for the District of Rhode Island against Joseph V. Broderick, Collector of Internal Revenue for the District of Rhode Island, for the recovery of $3,668.54. March 13, 1939, the District Court entered judgment for the plaintiffs in said sum with interest and costs. May 14, 1940, upon appeal by the Collector to the United States Circuit Court of Appeals for the First Circuit, the judgment of the District Court was reversed and the case was remanded to the District Court with direction to enter judgment for the defendant (the Collector). August 9, 1940, plaintiffs filed in the Supreme Court of the United States a petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit. September 20, 1940, a settlement of said case having been effected between the claimants and the Department of Justice, the petition for a writ of certiorari was dismissed by stipulation of counsel. Under the terms of this settlement agreement plaintiffs agreed to settle the case for $2,700 with interest. March 19, 1941, checks were issued to each of the plaintiffs in the sum of $1,083.40 in full payment of said settlement offer. Each of the certificates of overassessment accompanying the checks contained the following statement:

> The certificate of overassessment is issued pursuant to the directions contained in letter from the Department of Justice dated September 6, 1940. Under such directions payment of the sum mentioned herein is made in full settlement of all issues involved in the case of *Alice F. Keefe, et al.*, v. *Broderick*, now pending in the United States District Court for the District of Rhode Island, and dismissal of said action with prejudice is to be entered.

6. August 21, 1940, claimants filed with the Collector of Internal Revenue a claim for refund of $6,332.27, a copy

of which is in evidence as "Exhibit A." The claim for refund was based upon the alleged erroneous inclusion in the gross estate of the decedent of the excess of the proceeds of the following policies of life insurance over the $40,000 exemption provided by law:

Policy No. 36207—State Mutual Life Assurance Co	$5,041.30
Policy No. 79964—State Mutual Life Assurance Co	20,140.65
Policy No. 79965—State Mutual Life Assurance Co	10,070.30
Policy No. 85709—State Mutual Life Assurance Co	15,116.00
Policy No. 85710—State Mutual Life Assurance Co	15,116.00
Policy No. 85711—State Mutual Life Assurance Co	20,154.65
Policy No. X1337186—The Equitable Life Assurance Society of the United States	10,033.60
Policy No. X1337187—The Equitable Life Assurance Society of the United States	10,033.60
	105,706.10

There were included in the above list of policies, the two policies totalling $25,186.30—namely, policies No. 79965 and No. 85709 of State Mutual Life Assurance Company—which were the subject of the prior claim for refund with respect to which the claimants received payment in settlement as aforesaid. The present action is based upon the erroneous inclusion in the gross estate of the remaining policies totalling $80,519.80.

7. Policy No. 36207 of State Mutual Life Assurance Company in the face amount of $5,000 was taken out by the decedent October 8, 1894. The beneficiary at the date of issue was the insured's estate. March 30, 1896, the beneficiary was changed to Statia S. Keefe. An amendment to the application for insurance dated November 19, 1932, requested the insurance company to amend the policy in part as follows:

> I expressly reserve the right without the consent of any beneficiary or beneficiaries to change from time to time, subject to the rights of any assignee, the beneficial interest upon filing a written request with said Company at its Home Office in such form as it may require.

November 26, 1932, the beneficiary was changed to the insured's daughters, Alice S. Keefe, Gertrude S. Keefe, and Mary R. Keefe equally. The proceeds paid at death were $5,041.30.

8. Policy No. 79964 of State Mutual Life Assurance Company in the face amount of $20,000 was taken out by the decedent May 17, 1904. The beneficiary at the date of issue was Statia S. Keefe. April 18, 1930, the insured requested that the application be amended in part as follows:

> The insured expressly reserves to himself the right to change at any time hereafter the beneficial interest under this policy without the consent of any beneficiary.

May 2, 1930, the beneflilary was changed to Alice S. Keefe, Gertrude S. Keefe, Mary R. Keefe, et als. The proceeds paid at death were $20,140.65.

9. Policy No. 85710 of State Mutual Life Assurance Company in the face amount of $15,000 was taken out by the decedent March 31, 1905. The beneficiary at the date of issue was the insured's estate. April 14, 1911, the beneficiary was changed to Gertrude S. Keefe and Mary R. Keefe. The change of beneficiary provided in part, "The said insured has furthermore expressly reserved the right to change from time to time, subject to the rights of any assignee, the beneficial interest, upon filing a written request with said Company at its Home Office * * *." June 15, 1917, the beneficiary was changed to Gertrude S. Keefe, Mary R. Keefe, et als.; and June 13, 1927, the beneficiary was changed to the insured's estate. On that same date the beneficiary was again changed to Gertrude S. Keefe, Mary R. Keefe, et als. May 2, 1930, a further designation of Gertrude S. Keefe and Mary R. Keefe, et als. as beneficiaries was made. The proceeds paid at death were $15,116.

10. Policy No. 85711 of State Mutual Life Assurance Company in the face amount of $20,000 was taken out by the decedent March 31, 1905. The beneficiary at the date of issue was the insured's estate. March 14, 1911, the beneficiary was changed to Alice S. Keefe and Helen C. Keefe, the change providing in part as follows: "The said insured has furthermore expressly reserved the right to change from time to time, subject to the rights of any assignee, the beneficial interest, upon filing a written request with said Company at its Home Office * * *." June 15, 1917, the beneficiary was changed to Alice S. Keefe and Helen C.

Keefe, et als.; June 13, 1927, the beneficiary was changed to the insured's estate; June 15, 1927, the beneficiary was changed to Alice S. Keefe, et als.; and May 2, 1930, the beneficiary was changed to Alice S. Keefe, Mary R. Keefe, and Gertrude S. Keefe, et als. The proceeds paid at death were $20,154.65.

11. Policy No. X1337186 of the Equitable Life Assurance Society in the face amount of $10,000 was taken out by the decedent June 8, 1904. The beneficiary at the date of issue was Alice S. Keefe. This policy provided—"This policy is issued with the express understanding that the insured may, from time to time during its continuance, change the beneficiary or beneficiaries, by filing with the Society a written request duly acknowledged, accompanied by this policy, * * *." June 3, 1927, the beneficiary was changed to Alice S. Keefe or her issue, or Gertrude S. and Mary R. Keefe. September 9, 1927, November 1, 1927, December 16, 1927, and July 14, 1930, further changes were made in the mode of settlement and the disbursement of the proceeds in the event of the death of Alice S. Keefe. The proceeds paid at death were $10,033.60.

12. Policy No. X1337187 of the Equitable Life Assurance Society in the face amount of $10,000 was taken out by the decedent on June 8, 1904. The beneficiary at the date of issue was Helen C. Keefe. The policy provided in part—"This policy is issued with the express understanding that the insured may, from time to time during its continuance, change the beneficiary, or beneficiaries, by filing with the Society a written request duly acknowledged, accompanied by this policy * * *." On August 27, 1927, the beneficiary was changed to Alice S. Keefe, Gertrude S. Keefe and Mary R. Keefe. On July 14, 1930, a further change in the mode of settlement to Alice S. Keefe, Gertrude S. Keefe and Mary R. Keefe was made. This change of beneficiary provided for the payment of the proceeds to be divided between the decedent's three daughters and it further provided that if none of the daughters should survive the insured, then the proceeds should be paid to the insured's executors or administrators. The proceeds paid at death were $10,033.60.

13. The Commissioner of Internal Revenue by registered letter dated December 9, 1940, rejected the claim for refund filed on August 21, 1940, referred to in finding 6 above. The plaintiffs have not received any part of the sum of $4,766.71 or interest by way of credit or otherwise.

The estate here represented by plaintiffs paid the estate tax as determined and assessed by the Commssioner of Internal Revenue and demanded by the Collector, as follows:

On return, August 3, 1936	$14, 037. 33
Additional tax, June 7, 1937	609. 85
Additional tax, August 25, 1937	2, 663. 73
Additional tax, October 8, 1937	3, 668. 54
Total	20, 979. 45

If plaintiffs are correct in their claim that the insurance proceeds hereinbefore mentioned are not taxable, the correct total net estate tax liability is $12,673.11, or $8,306.34 less than the amount of tax collected. Of the last mentioned amount the sum of $6,332.27 may be legally refunded under the refund claim filed, and the balance of $1,974.07 is barred by the statute of limitation and may not be legally refunded.

The court decided that the plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The question in this case is whether the proceeds of six life-insurance policies amounting to $80,519.80 were properly included, in excess of the $40,000 exemption, by the Commissioner of Internal Revenue in the gross estate for the purpose of determining the net estate subject to tax.

The plaintiffs contend that inasmuch as all of the policies were taken out by the decedent on his own life prior to the Revenue Act of 1918, which was the first revenue statute requiring the inclusion in the gross estate for the purposes of the estate tax, of the proceeds of life-insurance policies, such proceeds were not taxable when the insured died August 3, 1935. The insured reserved the right to change the beneficiaries and he did change them or change their rights under the policies in 1930 and 1932. The position and argument of plaintiffs are summarized in their brief as follows:

> The Supreme Court in the *Frick* case [*Lewellyn* v. *Frick*, 268 U. S. 238] held that there was no difference

between a policy in which the insured retained no rights and a policy in which he retained the right to change the beneficiary. If the right to change is thus immaterial, surely the exercise of that right, after the enactment of the statute, is likewise immaterial. The insured in the *Frick* case could have changed the beneficiary after 1918 just as readily as did John W. Keefe. The fact that Mr. Frick did not exercise his right, whereas John W. Keefe did, is a distinction without a difference. In both cases the power was present, and the fact that the insured in one case exercised his power whereas in the other case he did not is a matter having no legal significance.

The defendant makes three contentions. The first contention is that the decisions in *Lewellyn* v. *Frick*, 268 U. S. 238, *Bingham* v. *United States*, 296 U. S. 211, and *Industrial Trust Co., et al., Executors* v. *United States*, 296 U. S. 220, are not controlling under the facts in this case because the insured retained in the insurance contracts the right to change the beneficiaries under the policies, the proceeds of which were expressly made subject to the estate tax by section 302 (g) of the Revenue Act of 1926, applicable here, which provision was by subdivision (h) expressly made applicable to transfers, trusts, etc., whether made, created, arising, etc., before or after the enactment of that act. And also because Art. 27 of Treasury Regulations 80, promulgated under the 1926 act, required the inclusion of the proceeds of any policy of insurance "regardless of when the policy was * * * issued, if the decedent possessed at the time of his death any of the legal incidents of ownership." Art 25 of this regulation expressly defined the power to change the beneficiary of such a policy as a legal incident of ownership.

The second contention is that this case upon its facts is governed by the decisions in *Chase National Bank* v. *United States*, 278 U. S. 327, and *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. Under this contention it is argued by the defendant that in view of the decision in *Chase National Bank* v. *United States*, *supra*, which was several years later than the decision in *Lewellyn* v. *Frick*, *supra*, "it seems clear that where a right is reserved to change beneficiaries, which right is in existence at the date of death [after June 2, 1924], it is

immaterial when the policies were taken out, since, in such a case, the determination as announced in *Chase National Bank* is that the decedent at the time of his death had an incident or ownership in the policy and since that is so the statute is not applied retroactively in a constitutional sense."

* * *

The third contention of the defendant is that in any event the proceeds of the policies here in question were taxable because in 1930 and 1932, the insured, who did not die until August 3, 1935, exercised, under the terms of the policies, his right of ownership over the policies by changing all of the beneficiaries previously designated therein when the policies were taken out. It is therefore contended that the fact that the policies were taken out by the decedent prior to the enactment of the Revenue Act of 1918 is not controlling. It is further argued that this distinguishes the case of *Lewellyn* v. *Frick*, *supra*, where, although the decedent who died in 1919 after the passage of the 1918 act had the right under the policies therein involved except one, to revoke certain assignments and to change the beneficiaries, he did not exercise any right of ownership in the policies by changing any of the beneficiaries after the enactment of the 1918 Act. It is further argued by the defendant that the decisions in *Bingham* v. *United States* and *Industrial Trust Co.* v. *United States*, *supra*, are not directly in point for the reason that in each of those cases the insured had taken out the policies, designated the beneficiaries, and had assigned the policies and surrendered the right to revoke the assignments or to make any further change in the beneficiaries or to exercise any right of ownership over the policies, all prior to the enactment of the Revenue Act of 1918, and that the only interest which the insured had until death was the possibility of reverter by reason of a provision in the policies that if the insured should survive the designated beneficiaries and assignees the proceeds should be paid to the executors or administrators of the insured.

Upon the facts in this case and for the reasons hereinafter given, we are of opinion that defendant is correct in all of its contentions. We think this case is clearly distinguishable from *Lewellyn* v. *Frick*, 268 U. S. 238; *Bingham* v. *United States*, 296 U. S. 211; *Industrial Trust Co. et al.*, *Executors*,

v. *United States*, 296 U. S. 220, and *Ida Braun et al.* v. *United States* (Cong. No. 17749), this day decided. The only similarity between this case and the cases just cited is that all of the insurance policies involved were taken out and beneficiaries were first designated prior to the enactment on February 24, 1919, of the Revenue Act of 1918. But there are here other facts which are important from the standpoint of whether the proceeds of these policies were includible in the gross estate for the purpose of determining the net estate subject to the tax.

In *Lewellyn* v. *Frick*, *supra*, the eleven policies involved were all taken out prior to 1918 and the beneficiaries thereunder were designated also prior to that year and no changes in any of the beneficiaries were thereafter made. One of the policies named the beneficiary without reservation of power to revoke or change; the others reserved to the insured the power to change the assignments or the designated beneficiaries. Frick died December 2, 1919. Section 402 (f), Revenue Act of 1918, which taxed the proceeds of life insurance policies, was not retroactive. This taxing provision was first made retroactive by section 302 (h), Revenue Act of 1924, approved June 2, 1924.

In its opinion in the *Frick case* the Court, pp. 251, 252, said:

> We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. There would be another if the provisions for the liability of beneficiaries were held to be separable and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle "that the laws are not to be considered as applying to cases which arose before their passage" is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their

money in other ways. *Schwab* v. *Doyle*, 258 U. S. 529, 534. This case and the following ones, *Union Trust Co.* v. *Wardell*, 258 U. S. 537, *Levy* v. *Wardell*, 258 U. S. 542, and *Knox* v. *McElligott*, 258 U. S. 546, go far toward deciding the one now before us. They also indicate that the Revenue Act of 1924, c. 2, § 302 (h); 43 Stat. 250, 305, making (g) (the equivalent of (f) above) apply to past transactions, does not help but if anything hinders the Collector's construction of the present law. *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602.

We think it would extend the decision in the *Frick case* further than the court intended that it should go to hold it determinative of the question here presented upon the facts in this case and section 302 (g) and (h), Revenue Act of 1926. The doctrine of the *Frick case* should, we think, be applied "strictly and only in circumstances closely analogous to those which it disclosed," *Burnet* v. *Coronado Oil & Gas Company*, 285 U. S. 393, 398.

In *Bingham et al., Executors*, v. *United States*, *supra*, the facts were that prior to 1900 the insured (King Upton) took out seven insurance policies on his own life. Four of the policies were assigned by the insured in 1904 to his wife "provided she survives me." In the others the beneficiaries were named without reservation of power to change them. The decedent Upton had no power, none being reserved, to change any of the beneficiaries, to pledge or assign the policies, or to revoke the assignment to his wife, or surrender the policies without the consent of the beneficiaries. The insured died February 27, 1921, while the Revenue Act of 1918 was in effect.

The court held, first, that upon the facts the decision in the *Frick case* was applicable, and, second, that the principles announced in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, were also decisive in favor of the taxpayers.

On the first point the court, at pp. 218, 219, said:

> Eleven policies were involved in the *Frick* case, all antedating the passage of the act. * * * These policies in terms were identical with the corresponding policies in question here. The assignment of the Berkshire policy there was the same as the assignments here. This court applied the rule that acts of Congress are to be

construed, if possible, so as to avoid grave doubts as to their constitutionality, and said that such doubts were avoided by construing the statute as referring only to transactions taking place after it was passed. In that connection we invoked the general principle "that the laws are not to be considered as applying to cases which arose before their passage" when to disregard it would be to impose an unexpected liability that, if known, might have been avoided by those concerned. The court below sought to distinguish the decision on the ground that this court did not refer to those specific provisions set forth in the policies and assignments which are pertinent here. The government makes the same point, and contends that since this court did not allude to these provisions in the opinion, the decision cannot be regarded as having passed on their effect. * * * In *Lewellyn* v. *Frick* the policies and assignments, in their entirety, were definitely before the court; and this necessarily included each of the provisions which they contained. Moreover, both in the appendix to the government's brief and in the main brief of the taxpayers, the attention of the court was distinctly called to all of the provisions which are now invoked. The latter brief summarized and described the provisions of the four classes of policies which were involved * * *. This court, without stopping to recite the various specific provisions that were thus clearly brought to its attention, held that the proceeds of none of the policies were subject to the estate tax under § 402 (f). It fairly must be concluded that in reaching that result these provisions were considered, and that such of them as bore upon the problem, there as well as here presented, were found not to require a different determination. We think the points now urged by the government were decided in the *Frick* case, and find no reason to reconsider them.

From the above it will be seen that the decision in the *Frick case* was applied because the facts in the two cases were substantially the same.

On the second point the court, at p. 219, said:

The principles so recently announced by this court in *Helvering* v. *St. Louis Union Trust Co.*, *ante*. p. 39, and *Becker* v. *St. Louis Union Trust Co.*, *ante*, p. 48, are decisive of the case in favor of the taxpayers. Those principles established that the title and possession of the beneficiary were fixed by the terms of the policies and assignments thereof, beyond the power of the insured to affect, many years before the act here in question was

passed. No interest passed to the beneficiary as the result of the death of the insured. His death merely put an end to the possibility that the predecease of his wife would give a different direction to the payment of the policies.

The opinions in the two cases cited in the last above quotation from the *Bingham case* were expressly overruled in *Helvering* v. *Hallock* (and companion cases), 309 U. S. 106. In the *Hallock* group of cases two of the 3 trusts involved were created in September 1919 and in 1925 and the transferors died in 1932 and 1934, respectively, and the third trust was created in 1917 and the transferor died in 1930. Each trust contained a provision that if the transferor should survive the beneficiary of the trust income the trust corpus would be returned to the creator of the trust. The court held that the trust properties were includible in the gross estate of the transferors under section 302 (c) of the Revenue Act of 1926, as amended by section 803 of the Revenue Act of 1932. The court did not have any occasion in the *Hallock case* to mention or discuss the case of *Lewellyn* v. *Frick*, *supra*, because of the statutory provision applicable and the particular facts, with reference to the question therein decided. But under the facts of the case at bar, the reasoning and the principles announced and applied in the *Hallock case*, have an important bearing on the question presented upon the facts now before us. See *Bailey* v. *United States*, 90 C. Cls. 644.

The case of *Industrial Trust Co. et al., Executors*, v. *United States*, 296 U. S. 220, 222, involved life-insurance policies similar in all material respect to those before the court in the *Frick case* and the *Bingham case*, the only distinguishing feature being that the insured in the *Industrial Trust Co. case* died in 1930 subsequent to the retroactive enactment of section 302 (g) and (h) of the Revenue Act of 1924. Subsection (g) of 302 was the same as section 402 (f) of the Revenue Act of 1918.

The policy in the *Industrial Trust Co. case* was taken out in 1892 at which time the beneficiary was designated without reservation of power to change the beneficiary. The policy became a paid-up policy March 4, 1912. We held (80 C. Cls. 647, 651–662) that since the insured did not die until May 30,

1930, the proceeds of the insurance policy were taxable as a part of the insured's estate under section 302 (g) and (h) of the Revenue Act of 1926 because of the provision in the policy that if the named beneficiaries predeceased the insured the proceeds should be paid "to the executors, administrators, or assigns of William M. Greene," the insured. We further held that the retroactive provisions of section 302 (h) of the Revenue Act of 1926 applied to such a case and as so applied it was constitutional. The Supreme Court reversed this court (296 U. S. 220) and said, pp. 221, 222:

> No power was reserved to change beneficiaries, borrow on the policy, or surrender it. The wife of the decedent predeceased him; but he was survived by three children, to whom the proceeds of the policy were paid upon his death.
>
> The case of *Lewellyn* v. *Frick*, 268 U. S. 238, arose under the Revenue Act of 1918. This case arises under the act of 1926, § 302 (g), which is the same as § 402 (f) of the former act. Subdivision (h) of the 1926 act, however, provides that subdivisions (b), (c), (d), (e), (f), and (g) shall apply to "transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act." Whether any of these terms apply to an amount receivable by a beneficiary, under a policy such as we have here, is fairly debatable. See *Wyeth* v. *Crooks*, 33 F. (2) 1018, 1019. If any of them do apply, the provision is open to grave doubt as to its constitutionality, and the rule of the *Frick* case controls.
>
> The foregoing facts bring the case clearly within our decision just announced in *Bingham* v. *United States*, *ante*, p. 211; * * *

In the case at bar the insured at all times until the date of his death August 3, 1935, had the right and power to change the beneficiaries or their interests under the policies and this power was exercised by the insured in 1930 and 1932. We think these facts are sufficient to distinguish this case from the cases of *Lewellyn* v. *Frick*, *supra; Bingham et al.* v. *United States*, *supra*, and *Industrial Trust Co. et al.* v. *United States*, *supra*, and to bring this case within the provisions of section 302 (g) and (h), *supra*, and the principles announced and applied in *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Chase*

National Bank et al. v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, and *Helvering* v. *Hallock*, 309 U. S. 106.

As to defendant's third contention it should be specifically stated that when the decedent in 1930 and 1932 exercised his right of ownership and control over the insurance contracts as to the persons entitled to the proceeds thereof upon his death, and changed such beneficiaries or their interests previously created, he created interests in such proceeds to which the provisions of the then existing estate-tax act expressly attached. Therefore the provisions of the existing taxing statute, as applied to such proceeds in respect of which the decedent exercised his right of control and ownership under the terms of the policies, is not retroactive. After having exercised this right and changed the beneficiaries under the policies, the decedent and the insurance policies were in substantially the same situation, so far as the effect of the existing taxing act was concerned, as was present in *Chase National Bank* v. *United States*, *supra*. *Cf. Bailey* v. *United States*, 90 C. Cls. 644.

The defendant was correct in holding that the insurance proceeds were subject to tax.

Plaintiffs are not entitled to recover and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

THE CREEK NATION v. THE UNITED STATES

[No. F–369. Decided June 1, 1942] *

On Demurrer To Second Amended Petition

Indian claims; payment for rights-of-way under treaty of 1866 and act of February 28, 1902; remedy provided by statute.—Upon defendant's demurrer to plaintiff's second amended petition, it is *held* that the petition fails to allege any facts which would establish any liability on the part of defendant or to make the defendant in any way subject to suit by the plaintiff, and the demurrer is accordingly sustained and the petition dismissed.

*Affirmed by the Supreme Court, post, page 735.

Syllabus

Same; guarantee of "quiet possession."—Where, under the treaty of June 14, 1866, the plaintiff Indian Nation agreed to grant a right-of-way through their lands to any company that should be duly authorized by Congress and should undertake to construct a railway through the Creek country; and where, under the Act of February 28, 1902, the construction of a railway or railways was provided for, and such railways were constructed in accordance with the provisions of said treaty and statute; and where said treaty provided that the United States shou'd guarantee to the Creek Nation "quiet possession of their country," it is *held* that this guarantee of quiet possession referred to hostilities on the part of other tribes and not to encroachment by railroads which are not alleged to have done anything against the will of the plaintiff.

Same.—It was not possible for the Indians to have "quiet possession" of lands used in the operation of railways.

Same; payments by railway companies.—The provisions in the applicable statute with reference to payments manifestly apply to railway companies and not to the United States.

Same; defendant not liable for action of third parties.—It is not shown that there was any agreement or promise which would make the defendant liable for the action of third parties.

Same.—The statute provided that certain payments should be made to the plaintiff before the land was taken, and also afterwards, but it nowhere required the defendant to collect such payments or to make them.

Same; trespass; remedy.—Where the statute (34 Stat. 137) upon which the plaintiff relies provides that "all revenues * * * accruing to the Creek Nation (from the sale of said lands to the railways) shall be collected" by an officer of the Department of the Interior; it is *held* that the alleged cause of action stated is based upon an alleged trespass, which, if committed, would not create any "revenue" but merely give cause for an action for trespass.

Same; authority of Secretary of Interior to bring suit.—The provision of the statute (34 Stat. 137, section 18) which provides that "the Secretary of the Interior is hereby authorized to bring suit in the name of the United States," for the use of the Five Civilized Tribes, "for the collection of any moneys or recovery of any land claimed by any of said tribes," is permissive only and creates no liability on the part of the defendant in case the Secretary failed to do so. *United States* v. *Creek Nation*, 295 U. S. 103, distinguished.

Same; remedy provided by statute.—Where the statute providing for the construction of railways through the lands of plaintiff (32 Stat. 43) made provision both for ascertaining the amount due either to the tribe or to individual occupants of the land taken by the railways and for the payment thereof; and where

Opinion of the Court

it was further provided "that the United States Court for the Indian Territory and such other courts as may be authorized by Congress shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies" arising between the named railway company and the plaintiff Indian Nation; and where the same provisions were also made with reference to the construction of a railway through the Indian lands by any other company duly authorized; it is *held* that a full and complete remedy was provided by the statute but the remedy created was an action against the railway company and not one against the United States.

Mr. Paul M. Niebell for the plaintiff. *Mr. C. Maurice Weidemeyer* was on the brief.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

The facts sufficiently appear from the opinion of the court.

GREEN, *Judge*,* delivered the opinion of the court:

The suit is based upon the action of certain railway companies in taking over a right-of-way through the Creek country under the Treaty of 1866, 14 Stat. 785, and the Act of February 28, 1902, 32 Stat. 43, and particularly in the appropriation of certain areas along the right-of-way for station reservations and the failure of the defendant to collect and pay to plaintiff the sums alleged to be due the plaintiff by reason of such wrongful action. Plaintiff's first amended petition alleged that these appropriations were not authorized by the Treaty or statute, that the land was not necessary for railroad purposes and was not used therefor but was rented by the railroads to third persons. Plaintiff also alleged that no compensation was paid for the land so taken and that annual charges prescribed by the Act of 1902 were not paid. Plaintiff further alleged that by the terms of the Treaty and the Act of 1902, the United States guaranteed against intrusion by the railroads and assumed the duty of collecting from the railroads the compensation and annual charges due and recovering money damages. Relief by way of money damages was demanded.

Defendant demurred to plaintiff's first amended petition, on the ground, among others, that the court was without

*Judge Green was recalled to active service at this time.

jurisdiction over the subject matter and that the petition set out no cause of action. This demurrer, at first, was overruled but afterwards a similar demurrer of the *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, was sustained. The causes of action being essentially similar, the court withdrew its earlier decision in case at bar and sustained defendant's demurrer upon the authority of the *Choctaw and Chickasaw case*, *supra*. More than eight and one-half years after the approval of the Jurisdictional Act (May 24, 1924) 43 Stat. 139, plaintiff filed its second amended petition to which the defendant again demurs. It is contended on behalf of the defendant that no new cause of action is set up in the second amended petition or any cause of action whatever, and that following the decision in the *Choctaw and Chickasaw case*, the demurrer should be sustained.

In the second amended petition the plaintiff sets up five causes of action which may be summarized as follows:

In the first it alleges that by Article I of the Treaty of June 14, 1866, *supra*, the United States guaranteed to the Creek Nation quiet possession of its national domain reserved under the treaty; that by Article V the plaintiff granted a right of way through its domain for the construction of a railroad; and that under this treaty it became the duty of defendant to supervise the right of way and protect plaintiff in the quiet possession of its lands not so granted. That defendant authorized two railroad companies to construct roads through the Creek domain and to take rights of way 200 feet in width; that defendant permitted these railroad companies to stake out certain "station reservations" along the rights of way which were not granted by the Treaty of June 14, 1866, which were not necessary to the operation of the railroads and were never used for railroad purposes; that such action was an unauthorized intrusion upon the lands of plaintiff permitted by defendant; that defendant knowing the facts has failed and refused to enforce the treaty and put plaintiff in possession of its lands, and therefore is liable to plaintiff for the value of the "station reservations" because of the violation of the treaty.

The second count alleges similar wrongful actions on the part of other railroad companies which had constructed lines.

within the plaintiff's territory under the authority of the Act of February 28, 1902, *supra;* whose action it is said it was the duty of defendant to supervise, and in substance alleges that by reason thereof the defendant became liable to plaintiff in damages under the provisions of said act and the Treaty of 1866.

For a third cause of action, the plaintiff alleges that Section 15 of the Act of February 28, 1902, *supra*, provided that before any railroad should be constructed on any lands taken for railroad purposes full compensation for the lands taken and for damages done by the construction should be made to the tribe; that Section 16 thereof further provided that the companies constructing railroads under the Act of February 28, 1902, should pay to the Secretary of the Interior for the benefit of the nation through the lands on which the railroad was constructed an annual charge of $15 a mile for each mile of road constructed, but that defendant has failed to collect the compensation due.

For a fourth cause of action, plaintiff alleges that under Section 11 of the Act of April 26, 1906, 34 Stat. 137, the defendant was required to collect all revenues of whatever character accruing to the Creek Nation and that it therefore became the duty of defendant to collect for plaintiff the rents and profits derived from plaintiff's lands thus unlawfully intruded upon by the railroads, but that in violation of its duties defendant permitted the railroad companies to collect the rents from plaintiff's land, thus depriving plaintiff of the benefits thereof, and that defendant has never accounted to plaintiff for these rents and profits.

For a fifth cause of action, plaintiff alleges that Section 18 of the Act of April 26, 1906, *supra*, requires the Secretary of the Interior to bring suit for the collection of any monies or the recovery of any lands claimed by the Creek Nation, and the United States courts in Indian Territory were given jurisdiction to try and determine such suits; that plaintiff has been deprived of the benefits of this provision by reason of the defendant failing to comply therewith, and by reason of its failure so to act defendant is liable to plaintiff for its violation of Section 18.

By Article V of the treaty referred to in plaintiff's peti-

tion, plaintiff Indians granted a right-of-way through their lands to any company that should be duly authorized by Congress and should undertake to construct a railroad from north to south and from east to west through the Creek country and agreed to sell to the United States a strip of land (not owned or occupied by a member or members of the Creek Nation lying along the line of the contemplated railroad) three miles in width.

This authority could only be given by the enactment of a statute which was evidently contemplated by the Treaty.

Accordingly a statute was passed (Act of February 28, 1902, *supra*,) which provided for the construction of a railway or railways across the domains of the plaintiff tribe which specified particularly that the railway companies might take and use for the purpose of the railway and no other purpose, a right-of-way 100 feet in width through the lands of plaintiff and also an additional strip of 200 feet in width in the length of 2,000 feet in addition to the right-of-way, for stations for every eight miles of road all to be used only for the construction and convenient operations of the railways.

The first and second causes of action are based in part on the provisions in the treaty that "the United States guarantees them (Creek Indians) quiet possession of their country." This is followed in the treaty by the clause "and protection against hostilities on the part of other tribes" together with other statements in the same connection.

We think this guarantee of quiet possession referred to hostilities on the part of other tribes and not to encroachments by railroads which are not alleged to have done anything against the will of the plaintiff. This construction is strengthened by other provisions in the treaty by which the Creeks agreed to the disposition of their land for railroad purposes, and also by the provisions of the statute which followed.

The guaranty of quiet possession upon which the plaintiff relies could not apply to the right-of-way granted by the treaty for the construction of railways on the lands taken for station purposes. It was not possible for the Indians to have "quiet possession" of lands used in the operation of

railways. The statute enacted in pursuance of the treaty specified under what conditions the land might be taken, also the payments which should be made therefor. The defendant was not taking or using the land. The provisions with reference to payments manifestly apply to railway companies and not to the United States. The defendant neither directly nor by implication agreed it would be liable for damages in event the railway companies did not comply with the statute but instead prescribed the course which plaintiff should take to obtain payment for its land or compensation for its unauthorized use.

A fatal defect of the first two counts is the failure to show or allege any agreement or promise which would make the defendant liable for the action of third parties, which was held in effect to be necessary in the case of the *Choctaw and Chickasaw Nations, supra.* In that case, like the one before us, the petition alleged that a treaty authorized the construction of railroads through the plaintiff's lands, that railroads were constructed under this authorization, and in the process of construction certain tracts of land were set aside as station grounds. The petition then continues with an allegation that the lands taken by the railroads for station grounds were not necessary for right-of-way purposes, were not granted to the railroads under the treaty, were unlawfully appropriated, and the defendant has refused to protect the plaintiff's rights. The petition was held insufficient and although no general rule was laid down in sustaining the demurrer one reason given was that "No treaty or act of Congress is cited wherein the Government assumed liabilities of the character claimed in positive language * * *." The decision reviews the provisions of the Act of 1902 upon which the plaintiff relies and gives as an additional reason for its ruling that there is "no provision of the act imposing liability upon the Government as herein claimed." (Page 501 of the opinion.)

There are other authorities which support this ruling.

In the case of the *Nez Percé Tribe of Indians* v. *United States*, 95 C. Cls. 1, certiorari denied, 316 U. S. 686, it was held that a provision in a treaty that no white man shall be permitted to reside upon the reservation of the

Indians did not create an obligation on the part of the United States to respond in damages in event there was wrongful intrusion by the whites. This case also holds in effect that where a treaty does not expressly so provide, its violation by third parties will not impose upon the Government an obligation to respond in damages.

In *Pine Hill Company* v. *United States*, 259 U. S. 191, 196, the Supreme Court said: "A liability in any case is not to be imposed upon a government without clear words" and it is a well settled rule that the Government can not be sued without its consent which does not appear from either the Treaty or the Act of 1902.

The substance of the third count is that the plaintiff has not been paid for its lands taken for railway purposes and damages done, in accordance with the statute pleaded, and that it was the duty of the defendant to collect the compensation due; that defendant has failed to perform its duty in that respect and is consequently liable to plaintiff.

The statute provided that certain payments should be made before the land should be taken and also afterwards, but it nowhere required the defendant to collect such payments or make them. Instead it either directly provided that the constructing railways should pay whatever was due or made it plain that it was so intended without creating any liability on the part of the defendant. There is nothing in the statute from which it could even be implied that defendant would be liable if the payments were not made in accordance therewith. This count is therefore subject to the same general objections as counts one and two.

It will be observed that the fourth count of the petition seeks to recover rents and profits that are alleged to have been unlawfully collected by railroad companies wrongfully permitted to intrude upon plaintiff's lands. The statute upon which plaintiff relies, Act of April 26, 1906, *supra*, provides in section 11 thereof that "all revenues * * * accruing to the Creek Nation shall be collected" by an officer of the Department of the Interior, but the cause of action stated in this count is based upon an alleged trespass which, if committed, would not create any "revenues" but merely give cause for an action for trespass. It is obvious that the

statutory provision upon which plaintiff bases this count has no application to the claim made in this count, and that nothing is stated therein which would furnish the basis for a suit to recover damages from the defendant on any ground.

As before stated the fifth cause of action alleged that Section 18 of the Act of April 26, 1906, *supra*, required the Secretary of the Interior to bring suit for the use of the Creek Nation for the collection of any moneys or for the recovery of any lands claimed by the Creek Nation. This fifth count does not expressly allege any duty on the part of the defendant but it is manifestly framed on the theory that it was the duty of the Secretary of the Interior to bring such suit or suits. The plaintiff, however, misstates the language of the section to which reference is made for it does not require the Secretary to take such action but merely authorized him to bring suit and makes no provision for liability on the part of the defendant in case he failed to do so.

The plaintiff contends that although the Act is permissive in form it is mandatory in effect but the authorities cited do not sustain any such general rule.

The act last cited was entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes" and applied not only to the Creek Indians but the other four civilized tribes. It merely gave the Government permission in settling the affairs of these tribes to bring suit on claims made by them but did not require the defendant so to do. Here again there is no provision imposing liability if the Government fails to bring suit or anything from which such an obligation can be implied and the fifth count must also be held to state no cause of action.

In this connection, the plaintiff cites the case of the *United States* v. *Creek Nation*, 295 U. S. 103, 109, but the decision in this case was based upon facts which showed a direct liability on the part of the defendant and it has no application here.

In all of the counts except the last, it is alleged in substance that the acts of the defendant constituted a violation of its duties but these allegations with reference to the "duty"

of the defendant are merely conclusions of law and add nothing to the effect of the pleading.

For the reasons stated above, the petition as a whole must be held to state no cause of action but there is another and decisive reason for holding the first four counts insufficient.

The statute providing for the construction of railways through the lands of the plaintiff (Act of February 28, 1902, *supra*), made provisions both for ascertaining the amount due either the tribe or individual occupants of the land taken and for the payment thereof and further provided in Section 8 of the statute last referred to above "that the United States court for the Indian Territory and such other courts as may be authorized by Congress shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between the said Enid and Anadarko Railway Company and the nation and tribe through whose territory said railway shall be constructed," and also made a like provision with reference to the inhabitants of the nation or tribe and the railway company. The same provisions were also made applicable by the act with reference to the construction of a railway through the Indian lands by any other company duly authorized.

If a railway exceeded its rights in taking over the lands of plaintiff or failed to discharge its obligations to the Indians, then it became directly liable under the statute. It is the railway companies which are alleged to have violated the rights of the plaintiff nation and by such violation, if any, a controversy was created between the railways and the plaintiff nation. A full and complete remedy was provided by the statute in case any controversy should arise, but the remedy created was an action against the railway company and not one against the United States.

Plaintiff does not dispute the validity of this statute but relies upon it in stating the amount of land and the purpose for which it might be taken in constructing the railway. The provisions for determining the amount to be paid and enforcing the collection thereof are too long to set out here but the United States is not a party to the proceedings under them and is not responsible in case the plaintiff failed to make use of them. The statute as a whole shows plainly that

the constructing railway companies were solely accountable to the plaintiff for the land taken or used.

It thus appears that whatever duties growing out of the construction of the railways the defendant may have owed the plaintiff tribe, all have been discharged by the enactment of this statute which made elaborate provisions, not only for the determination by duly appointed referees of the amount due the Indians for their land taken or used, but also for the enforcement of any payments specified by the statute and the settlement of any controversy in relation thereto by conferring jurisdiction on a local United States court over all of these matters.

It must be presumed that the referees and other officers together with the courts discharged their duties under this statute and whenever any controversy arose by reason of the Indians making claim that they had not received the amount to which they were entitled as payment for their lands or use thereof, or denied in any way compensation to which they were entitled, their claims were heard and determined and they received what was due them accordingly. Now, long after the railways have been constructed (as the Court will take judicial notice), and proceedings in the forum provided for plaintiff have been barred on the claims now presented by the statute of limitations, the plaintiff tribe comes into court and seeks to set up new claims never before presented, upon which, if valid, it ought to have acted long ago.

There is nothing in the treaty or in the statute enacted pursuant to it that required the defendant to supervise the payments made to the Indians for the land taken by the railways, determine the amount which should be paid and require its payment for the benefit of plaintiff. On the contrary, the statute provided for the disposition of these matters by the referees and the courts.

The petition fails to allege any facts which would establish any liability or make the defendant in any way subject to suit by the plaintiff and for the reasons stated above we hold that no cause of action is set out either by the several counts of the petition or the petition taken as a whole.

The defendant raises the objection as to part of the claims

made by plaintiff that they are barred by the statute of limitations. What we have said above makes it unnecessary to pass on this issue but it may be said that the objection evidently overlooks the provisions of the Act of August 16, 1937, 50 Stat. 650, which was passed after the expiration of the time for filing a petition herein under the original act and gave this court authority to hear plaintiff's case notwithstanding lapse of time or statute of limitations.

The demurrer to the petition must be sustained and the petition dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE CREEK NATION v. THE UNITED STATES

[No. L–137. Decided June 1, 1942. Plaintiff's motion for new trial overruled October 5, 1942]*

On the Proofs

Indian claims; liability of United States for fraud or gross negligence of commission appointed under the Curtis Act and the "Original Creek Agreement" to appraise and sell town lots.—Where, under the Curtis Act (30 Stat. 495), and subsequently under the "Original Creek Agreement" (31 Stat. 861), commissions were appointed or approved by the Secretary of the Interior to survey, plat, schedule, and appraise town lots within the Creek Domain, it was *held* defendant would be liable if these commissions in the surveying, platting, scheduling, and appraising of the lots had been guilty of fraud or gross negligence. *Chippewa Indians of Minnesota* v. *United States*, 91 C. Cls. 97; *Ross* v. *Stewart*, 227 U. S. 530, 535; *Johnson* v. *Riddle*, 240 U. S. 467, 474.

Same; appraisals made by commission appointed to sell town lots conclusive in absence of fraud or gross mistake; character of evidence necessary to establish fraud.—It was also *held* that the correctness of the findings of these commissions was to be presumed, and that fraud or gross mistake could only be established by clear and convincing evidence, especially in view of the long lapse of time since the appraisals in the bringing of this suit.

*Plaintiff's petition for certiorari denied, *post*, page 736.

Same; disparity between appraisals and sale price or assessment for taxation.—Mere disparity between appraisal and subsequent sale price or amount of subsequent assessment not sufficient to show fraud or gross mistake, especially where conditions are not shown to have been the same.

The Reporter's statement of the case:

Mr. Paul M. Niebell for the plaintiff. *Mr. C. Maurice Weidemeyer* was on the brief.

Mr. Clifford R. Stearns, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Messrs. Raymond T. Nagle* and *Wilfred Hearn* were on the briefs.

The court made special findings of fact as follows:

1. This suit is brought under a special jurisdictional act, approved May 24, 1924 (43 Stat. 139), which confers jurisdiction on this court "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States * * *."

This Act was later amended by a joint resolution (44 Stat. 568) permitting plaintiff to bring separate suits on one or more causes of action, and by the Act of February 19, 1929 (45 Stat. 1229), and by the Act of August 16, 1937 (50 Stat. 650), not material to the issues.

2. Prior to the passage of the Act of June 28, 1898 (30 Stat. 495), known as the Curtis Act, all land in the Creek Domain, in what is now the State of Oklahoma, was owned by the tribe in common, and while an individual Indian might have had the exclusive right to use and occupy a particular area, and might have conveyed this right, he could not dispose of the fee.

A number of towns had grown up within the territory, and lots in these towns were occupied by white persons under various sorts of conveyances from the individual Indians,

none of whom undertook to convey a greater right than the individual Indian himself had, which was the exclusive right to use and occupy the land conveyed. On these lots considerable improvements had been made.

3. The Curtis Act provided for the allotment of certain portions of the Creek Domain to the individual members of the tribe, and for the sale of the remainder. Among the lands to be sold were the lots in the towns which had grown up and in such other towns as might be established. It provided for commissions to appraise and sell these lots. The occupant of a lot who had made permanent improvements thereon was entitled to purchase the same at one-half of its appraised value. The vacant lots and those on which permanent improvements had not been made were required to be sold at public auction.

Said commissions were required to be composed of one member of the tribe, to be appointed by the executive of the tribe, one member to be appointed by the Secretary of the Interior, and one member to be selected by the town. Commissions were appointed for the towns of Muskogee and Wagoner, which proceeded to appraise the lots in these two towns.

Before the lots in these two towns were sold the Creek Nation and the United States entered into an agreement known as the Original Creek Agreement, which was ratified by Congress and approved by the President on March 1, 1901 (31 Stat. 861), and which was ratified by the Creek Nation on May 25, 1901, and proclaimed by the President on June 28, 1901. This Act provided that the townsites be surveyed and platted, and that the lots within them be appraised at their true values, excluding improvements. It provided for a commission whose duty it should be to survey and plat, appraise, and sell the town lots. This commission was to be appointed by the Secretary of the Interior. It was provided that it should be composed of three men, one of whom was required to be a citizen of the tribe, to be nominated by the principal chief of the tribe. Under this agreement, as under the Curtis Act, an occupant of a lot who had made permanent improvements thereon was entitled to the prior right to purchase it at a certain portion of its appraised value. The vacant lots and those on which

permanent improvements had not been made were required to be sold at public action.

4. Upon ratification of this agreement, the Secretary of the Interior appointed the same persons to act as townsite commissioners for the towns of Muskogee and Wagoner as had been appointed previously under the Curtis Act, and he later appointed other commissioners for the other towns within the territory. The towns in which lots were sold were as follows:

Beggs	Mounds
Bixby	Muskogee
Boynton	Okmulgee
Bristow	Red Fork
Checotah	Sapulpa
Coweta	Tulsa
Eufaula	Wagoner
Henryetta	Wetumka
Holdenville	

The commissioners so appointed were qualified to discharge the duties for which they were appointed.

5. Section 10 of the Creek Agreement, above referred to, provided in part as follows:

> * * * Each commission, under the supervision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing Act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree, the matter shall be determined by such Secretary.

6. The commissions for the towns of Muskogee and Wagoner adopted the appraisals made under the authority of the Curtis Act a year previously. In transmitting the report of this commission previously made under the Curtis Act, the Indian Inspector for the Five Civilized Tribes stated:

> In my judgment, the appraisals of business lots are fixed at an extremely low figure in some instances, considering what prices such property as has been and is held for occupancy rights only.

It was nevertheless forwarded with his approval, and it was also approved by the Commissioner of Indian Affairs on June 23, 1900, and by the Secretary of the Interior on June 28, 1900. When resubmitted after the Creek Agreement on August 3, 1901, it was again approved by the Secretary on August 10, 1901.

7. The lots in the town of Wagoner were appraised in 1901, and all the rest in 1902, except the town of Boynton, which was appraised in 1905. Prior to the time the appraisals were made no lots within the Creek Domain had ever been sold, and no market values had been established. The commissioners in making the appraisals visited each lot, noted its location and desirability, considered the condition of the country surrounding the town, the proximity of the town to railroads, and such other facts as might bear on the value of lots. In making the appraisals the commissioners exercised their best judgment of the value of each of the lots. In each instance the appraisals were unanimous, and in each instance the Indian Inspector and the Commissioner of Indian Affairs recommended that they be approved, and in each instance they were approved by the Secretary of the Interior.

After the appraisals had been made, deeds to the lots were executed by the Principal Chief of the Creek Nation. At the time these deeds were executed no one complained that the appraisals were too low.

8. On October 12, 1904, the Creek Nation passed an Act complaining of wrongful scheduling of the lots, by which is meant making a schedule of the occupants of the lots who had made permanent improvements thereon, and who were, therefore, entitled under the Act to purchase the same. In this Act it was requested that an investigation be made of the scheduling and appraisal of the lots.

Later, on October 19, 1906, the Creek Nation presented a memorial to Congress complaining of wrongful scheduling of the lots, but in this memorial no complaint was made that they had been appraised too low. As a result of this memorial, an Act was passed (34 Stat. 137, 144) authorizing the filing of suits to remedy the wrongs complained of. Two

hundred thirty-one such suits were filed based upon wrongful scheduling of the lots.

9. The appraisals of the entire lots in a number of the towns were considerably lower than the aggregate amount at which the town authorities assessed these lots for taxation in the following year, but it is not shown how much the aggregate of the assessment for taxation includes assessment on improvements, and how much on the lots, nor is it shown that conditions were the same at the time of appraisal and at the time of assessment for taxation.

In other instances, the appraisal of vacant lots by the townsite commissions were considerably less, one-half or more less, than the price at which these lots sold at public auction a year or so later, but the proof does not show that the conditions were the same at the time the property was appraised and at the time it was sold at public auction.

There is no proof in the record from which can be determined the true values of the lots at the time they were appraised other than the appraisals themselves. The proof does not show that the lots were not appraised at their true values. There is not sufficient proof in the record from which the true values of the lots as of the date of the appraisals can be determined by us.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues the defendant for the difference between the sale price of its town lots, which were sold by a commission appointed by the Secretary of the Interior, and what it alleges was the "true value" thereof.

Prior to the passage of the Curtis Act, approved June 28, 1898 (30 Stat. 495), all land in the Creek Domain was owned by the tribe in common; but that Act provided for the allotment of certain portions of the land to the individual members of the tribe and for the sale of the remainder. Among the lands to be sold were lots in the towns within its territory. Section 15 of the Act provided for a commission to appraise and sell these lots. It was provided that the

commission should be composed of one member of the tribe in question, to be appointed by the executive of the tribe, one member to be appointed by the Secretary of the Interior, and one member to be selected by the town.

A commission for the town of Muskogee was appointed pursuant to this Act, consisting of Dwight W. Tuttle, John Quincy Adams, and Benjamin F. Marshall, the latter being the appointee of the executive of the tribe. A similar commission was appointed for the town of Wagoner. In due course they proceeded to appraise the lots in these two towns.

Before the lots were sold the plaintiff and the defendant entered into an agreement known as the Original Creek Agreement, ratified by Congress and approved by the President on March 1, 1901 (31 Stat. 861), and ratified by the Creek Nation on May 25, 1901, and proclaimed by the President on June 28, 1901. This agreement also provided for the sale of lots within the towns. Its provisions for the appointment of commissions were similar to those of the Curtis Act, except that they provided for their appointment by the Secretary of the Interior, one of whom was required to be a citizen of the tribe, to be nominated by the Principal Chief of the tribe.

Upon the passage of this Act the Secretary of the Interior appointed the same commissions for the towns of Muskogee and Wagoner previously appointed under the Curtis Act, and he later appointed commissioners for the other towns within the Creek territory.

Upon the reappointment of the commissions for Muskogee and Wagoner they adopted their appraisals formerly made under the Curtis Act, and in due course reported them to the Secretary of the Interior, and they were approved by him. The commissioners appointed for the other Creek townsites made their appraisals in due course and reported them to the Secretary of the Interior, and their appraisals were approved by him.

It is alleged that these appraisals were arbitrary, fictitious, unreasonable, and made without any attempt to fix true values of the lots, and were far below the true values

thereof. This, it is alleged, constituted a taking of plaintiff's property by the defendant, for which it is required by the Fifth Amendment of the Constitution to pay just compensation; or, if this be not true, it is alleged that the appraisals and their subsequent approval by the Secretary of the Interior were a violation of the Creek Agreement, for which the defendant is liable to respond to plaintiff for the loss suffered thereby.

The Agreement required the Secretary of the Interior to appoint townsite commissions, and required the commissions to appraise and sell the town lots under his supervision. It is necessarily to be implied that the Secretary was obligated to act in good faith in the appointment of these commissioners, and that the commissioners were obligated to act in good faith in appraising and selling the lots, and if either the Secretary or the commissioners in the discharge of their duties perpetrated a fraud on plaintiff's rights, or were guilty of gross negligence in the discharge of their duties, the defendant is liable in damages therefor. See *Chippewa Indians of Minnesota* v. *United States*, 91 C. Cls. 97; *Ross* v. *Stewart*, 227 U. S. 530, 535; *Johnson* v. *Riddle*, 240 U. S. 467, 474.

In *Ross* v. *Stewart*, *supra*, the court said of the action of these townsite commissions:

> All reasonable presumptions must be indulged in support of the action of the officers to whom the law entrusted the proceedings * * *.

In *Johnson* v. *Riddle*, *supra*, in which was attacked the validity of the act of the townsite commission in awarding the right to purchase a lot to one of two rival claimants, the Supreme Court said:

> * * * The Supreme Court of Oklahoma therefore was correct in holding that the findings of the Inspector respecting matters of fact, affirmed on final appeal by the Secretary, were binding upon the courts, in the absence of gross mistake or fraud (neither of which is here present), and that the judicial inquiry is limited to determining whether there was clear error of law that resulted in awarding the preferential right of purchase, and ultimately issuing the patent, to the wrong party.

The question for our determination, therefore, is whether or not these townsite commissions were guilty of fraud or made such a gross mistake as would justify us in setting aside their action and ourselves determining the value of these townsites.

It must be said at the outset that it would take the most clear and convincing evidence to induce us, especially at this time, forty years later, to set aside the findings of these commissioners, and ourselves undertake to fix the value of these lots. The Creek Agreement provided for the appraisal of these lots by the commission, and not by us. It was expressly provided:

> * * * The agreement of any two members of the commission as to the true value of any lot *shall constitute a determination thereof*, subject to the approval of the Secretary of the Interior, and if no two members are able to agree, the matter shall be determined by such Secretary. [Italics ours.]

The commissions for Muskogee and Wagoner appointed under the Curtis Act were composed of a representative of the town, a member of the tribe, and an appointee of the Secretary of the Interior. These commissions were continued under the Creek Agreement. On the other commissions there was a representative of the tribe. All the representatives of the tribe agreed to the appraisals; the appraisals were unanimous. In addition, they were approved, first, by the Inspector for the Five Civilized Tribes, then by the Commissioner of Indian Affairs, and finally by the Secretary of the Interior. The Principal Chief of the tribe without complaint signed deeds to the lots purchased on the basis of the appraisals.

The tribe itself had never complained that these appraisals were too low until this suit was filed. The tribe did complain that many lots had been wrongfully scheduled, but it has never asserted that they were undervalued. See the Act of the Creek Nation of October 12, 1904, and the memorial of October 19, 1906. (The Act authorized the commissions to make a schedule of the persons who had made permanent improvements on the lots and, therefore,

who were entitled under the Act to purchase such lots at one-half of their appraised value.)

In pursuance of the above-mentioned Act of the Creek Nation, and of this memorial by the Creek Nation, Congress passed an Act (34 Stat. 137, 144) authorizing the bringing of suits for the benefit of the Creek Nation "for the collection of any moneys or recovery of any land claimed by any of said tribes." Two hundred thirty-one suits were filed, but all of them were filed for wrongful scheduling of the lots, and none on account of undervaluation thereof. So far as is known, the first complaint that has ever been registered for undervaluation of these lots by the townsite commissions was registered when this suit was instituted—thirty years after the appraisals were made.

Under these circumstances, it would take proof of the strongest character to make us conclude that there was either fraud or gross error in these valuations. The proof offered by the plaintiff fails to convince us of either. It complains, first, that the townsite commissions for Muskogee and Wagoner appointed under the Creek Agreement adopted the appraisals made by them under the Curtis Act a year before; but the plaintiff does not show that values had increased in the meantime. It cites several instances where the appraisals by the townsite commissions were considerably below the assessments for taxation a year or so later; but it does not show that values were the same. It points to instances where the vacant lots were sold at auction a year or so later for sums more than twice the amount of the appraisals; but again it does not show that values had not increased. The same is true of reports of estimates of values by the school superintendent as compared with the appraisals.

This is the extent of plaintiff's proof to show fraud or gross mistake. It is practically all inadmissible, since there is no showing that conditions were the same.

Although there is a large disparity in some of the figures, yet it must be remembered that prior to the time the townsite commissions made their valuations there had been no market for the lots, because the lots could not be sold.

It was an extremely difficult thing for anyone to say just what these lots would bring when they were put on the market. At the time the appraisals were made no improvements had been made in any of the towns. The Indian Inspector for the Five Civilized Tribes stated in his testimony that none of them had been incorporated, none had any water or sewers, or street pavements, or sidewalks, or any modern conveniences; that the streets in the dry season were very dusty, and in the wet season were practically impassible. These lots were assessed for taxation by the town authorities apparently after incorporation, and, for all that appears, after improvements had been made or were in prospect. The assessments for tax purposes apparently included not only the value of the lots, but the improvements thereon. The appraisals of the townsite commissions related only to the value of the land.

The proof shows that oil was discovered in the vicinity of some of the towns, at any rate, in the interim between the appraisals by the townsite commissions and the assessment for taxation.

The record indicates that the appraisals were low, but we are by no means convinced that they were fraudulent, or that such gross mistake was made as to justify us in setting aside the appraisals made, and to undertake now, forty years later, to determine what the true values were. If there had been fraud or gross mistake, complaint thereof would have been made long before, as was done in the matter of scheduling. Mere disparity between appraisal and subsequent sale price does not show fraud or gross mistake. Appraisals are made by sworn officers and are accepted as prima facie correct. To overcome such appraisals, clear and convincing evidence of fraud or gross mistake must be shown. As stated, the record fails to disclose that any event had happened which might have changed values. Often appraisals are higher than subsequent sale prices. The reverse is also true Fraud cannot be assumed. It must be proved by clear and convincing evidence. There is no such evidence in the record.

Moreover, the proof offered is wholly insufficient to enable us to fix the true values of these lots at the time of the

appraisals, even if we were convinced that fraud had been practiced or gross mistake had been made.

We are of the opinion that the plaintiff is not entitled to recover. Its petition, therefore, will be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

SIOUX TRIBE OF INDIANS v. THE UNITED STATES

[No. C-531-(7). Decided June 1, 1942. Plaintiff's motion for new trial overruled October 5, 1942]*

On the Proofs

Indian claims; treaty of 1868; lands acquired by Government under act of 1877; "taking"; "misappropriation."—Where, under article 2 of the treaty of April 29, 1868, with plaintiff tribe (15 Stat. 635) the Black Hills section of South Dakota, here involved, comprising about 7,345,167 acres, was included in the area set apart for the absolute and undisturbed use and occupation of the tribe, and, in addition, certain hunting privileges were granted by other articles of said treaty with reference to other lands; and where, under said treaty, the Government assumed an obligation, besides others, to provide food for the subsistence of all the members of said tribe for a period of four years; and where this obligation was fulfilled by the necessary annual appropriations; and where the Government, through an act of Congress in 1877, acquired said lands without the consent of three-fourths of the male adult Indians having been first obtained, as provided in article 12 of said treaty; and where, under the provisions of said act of 1877, the Government assumed an obligation to continue to appropriate, and has since appropriated annually, such sums as should be necessary for the subsistence of said tribe "until the Indians are able to support themselves" in return for the Black Hills and hunting rights acquired; and also added 900,000 acres of grazing land to the permanent reservation:

Held: A study of the facts and circumstances of the instant case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, and the application thereof to the provisions of the jurisdictional act

*Plaintiff's petition for writ of certiorari denied, *post*, p. 737.

Syllabus

(41 Stat. 738) in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in its dealings with said Indians leads to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a "taking" or "for the misappropriation of any land of said tribe." *Lone Wolf* v. *Hitchcock*, 187 U. S. 552, cited.

Same; authority of Congress.—Where Congress possessed the authority to take the action of which the plaintiff complains in the instant case, and where the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and to be just to both parties; it is *held* that there was no misappropriation of the land by the Government, and the court may not go back of the acts of 1876 and 1877 and inquire into the motives which prompted the enactment of this legislation or the wisdom thereof.

Same; jurisdiction.—The jurisdiction of the court must be found within the terms of the jurisdictional act, which merely provides a forum for the adjudication of the claim according to applicable legal principles. *Price* v. *United States and Osage Indians*, 174 U. S. 373, 375, and other cases cited.

Same; suit against Government.—Suit may not be maintained against the United States in any case on a claim not clearly within the terms of the statute by which it consents to be sued. *United States* v. *Michel*, 282 U. S. 556, 659, cited.

Same; special jurisdictional acts.—Special jurisdictional acts are strictly construed and clear grant of authority must be found in the act. *Blackfeather* v. *United States*, 190 U. S. 368, 373–376, and other cases cited.

Same.—Only where the consent "to suit" *without qualification* has been given in respect to suits against Government owned or controlled corporations has the act granting such consent been liberally construed. *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 387, 396, cited.

Same.—In the instant case the jurisdictional act, except so far as concerned the competency of the plaintiff tribe to sue and the limitation on the court's general jurisdiction under section 259, Title 28, U. S. C., as well as the statute of limitation, created no new right or claim in favor of the tribe not otherwise within the limitations of the court's general jurisdiction. *Green* v. *Menominee Tribe*, 233 U. S. 558, 570, 571; *Whitney* v. *Robertson*, 124 U. S. 190, 194, 195, cited.

Same.—The special jurisdictional act is a warrant of authority to adjudicate legal results, and not to determine the propriety or reasonableness of the means employed by Congress unless it appears that the action taken by the means adopted violated substantive rights of the Indians, and that the liability of the

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Government for a money judgment was a legal incident of the action taken by Congress. Compare *Mille Lac Chippewas* v. *United States*, 46 C. Cls. 424, 455.

Same; act of 1877.—Where the claim made by plaintiff for compensation as for a taking of its lands and hunting rights is fundamentally predicated upon the provisions of articles 2 and 12 of the treaty of 1868; and where the said claim is attempted to be sustained on the sole ground that the action of Congress, with the approval of the President, in requiring the plaintiff tribe to give up a portion of its reservation and hunting rights to the Government was not in conformity with the provisions of article 12 of the treaty of 1868 with reference to the consent of three-fourths of the tribe to a cession; and where there is no law of Congress relating to the said claim granting to plaintiff any rights which have not been faithfully fulfilled; it is *held* that the act of 1877 is not a law supporting said claim because everything that act promised has been given and also because the said statute was the act of the Government which gave rise to a claim of plaintiff, if it has one, under the treaty of 1868.

Same; authority of Congress.—The claim contemplated by the jurisdictional act must be one which arises under and is sustained by the treaty as against the action taken by Congress in the act of 1877; and where Congress had the authority legally to do what it did; and where the action taken and the results of such action were pursuant to and based upon what Congress deemed in the circumstances to be for the best interests of the Indians; it is *held* that the plaintiffs have no legal right, under the treaty or the terms of the jurisdictional act, to maintain a claim for more money, plus the addition of interest from 1877, in addition to the amount which Congress stipulated in the act of 1877 should be paid and which has been and is being paid, and will continue to be paid for the lands acquired, until the Indains, with the assistance of the Government, become self-supporting.

Same; inquiry into motives of legislation.—There was no misappropriation of the land by the Government and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of said legislation or the wisdom thereof.

Same; moral claim.—The claim in the instant suit is moral, rather than legal, and before the court can adjudicate or render judgment upon it, the court must have from Congress clear authority to do so, which authority, under the cases cited, was not conferred by the jurisdictional act. *Price* v. *United States and Osage Indians*, 174 U. S. 373, 375, cited.

Same; transactions between the Indians and the Government.—In transactions between private parties, one party to a proposed transaction cannot legally fix the terms or consideration and force the acceptance of the other party, but this legal proposition does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom or authority of Congress, unless Congress has clearly granted to the Indians the right to do so.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiff.

Mr. J. S. Y. Ivins, *Mr. Richard B. Barker*, and *Mr. Kingman Brewster*, *Mr. C. C. Calhoun* and *Mr. Rice Hooe* were on the brief.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

Plaintiff seeks to recover $189,368,531.05, together with an additional amount measured by interest as a part of just compensation amounting in all to approximately $739,-116,256 for the alleged taking by the defendant in 1877 of certain lands, and rights in lands of the plaintiff, amounting to 73,781,826.19 acres, alleged to have been contrary to and in violation of provisions of treaties of September 17, 1851, 11 Stat. 749, and April 29, 1868, 15 Stat. 635.

The question now before the court under Rule 39 (a) is whether, as a matter of law, the plaintiff tribe has a legal or equitable claim under section 1 of the Jurisdictional Act on which it is entitled to judgment under these treaties or any law of Congress for any amount due from the United States as for the misappropriation of any lands of said tribe, or for the failure of the United States to pay said tribe any money for other property due under any treaties or laws of Congress.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. At the time of the Louisiana Purchase in 1803, the Sioux Indians occupied, with other tribes, a large area of land situate in the territory now comprising the States of

Minnesota, Iowa, South Dakota, North Dakota, Nebraska, Wyoming, and Montana, and, of this area, the mountainous region now known as the Black Hills, South Dakota, was a part.

The discovery of gold in California in 1848 resulted in a tide of emigration, some of which passed through Wyoming and Nebraska where several of the Sioux bands of Indians, and those of other tribes, lived, roamed, and hunted. As a result of this western travel a treaty was negotiated with the Sioux Indians, and other Indian tribes of the Northwest, known as the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749. Articles 5, 7, and 8 of this treaty follow:

> ARTICLE 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:
>
> The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a south-westerly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the headwaters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.
>
> The territory of the Gros Ventre, Mandans, and Arrickaras Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.
>
> The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the headwaters of Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.
>
> The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the

Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head-waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek and thence to its mouth.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Bute, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.

It is however, understood that, in making this recognition and acknowledgment, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

ARTICLE 6. The parties to the second part of this treaty having selected principals or head-chiefs for their respective nations, through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior.

ARTICLE 7. In consideration of the treaty stipulations, and for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, and for their maintenance and the improvement of their moral and social customs the United States bind themselves to deliver to the said Indian nations the sum of fifty thousand dollars per annum for the term of ten years, with the right to continue the same at the discre-

tion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements, in such proportions as may be deemed best adapted to their condition by the President of the United States, to be distributed in proportion to the population of the aforesaid Indian nations.

ARTICLE 8. It is understood and agreed that should any of the Indian nations, parties to this treaty, violate any of the provisions thereof, the United States may withhold the whole or a portion of the annuities mentioned in the preceding article from the nation so offending, until, in the opinion of the President of the United States, proper satisfaction shall have been made.

2. The discovery of gold in Montana in 1861 resulted in a further tide of white emigration through the territory occupied by the Sioux Tribe of Indians, as described in the treaty of 1851. This line of travel was northward from the California Trail, near old Fort Laramie, Wyoming, along the valley of the Powder River, to and across the Yellowstone River and westward into the gold fields of Montana. As a result of this travel, disputes and conflicts arose with the Indians over this route on account of the large number of white travelers passing along it, and, between 1861 and 1867, there were a number of military engagements between the Government and the Indians.

3. Following the so-called Powder River War of 1866 and 1867 with the Sioux Indians, a treaty was entered into between the United States and the various bands of the Sioux Indian Tribe which was concluded April 29, 1868, and was ratified February 16, 1869, and proclaimed February 24, 1869; 15 Stat. 635, 640. This treaty was negotiated, made, and ratified pursuant to an act of Congress of July 20, 1867, 15 Stat. 17, as follows:

That the President of the United States be, and he is hereby, authorized to appoint a commission to consist of three officers of the army not below the rank of brigadier general, who, together with N. G. Taylor, Commissioner of Indian Affairs, John B. Henderson, Chairman of the Committee of Indian Affairs of the Senate, S. S. Tappan, and John B. Sanborn, shall have power and authority to call together the chiefs and headmen of such bands or tribes of Indians as

are now waging war against the United States or committing depredations upon the people thereof, to ascertain the alleged reasons for their acts of hostility, and in their discretion, under the direction of the President, to make and conclude with said bands or tribes such treaty stipulations, subject to the action of the Senate, as may remove all just causes of complaint on their part, and at the same time establish security for person and property along the lines of railroad now being constructed to the Pacific and other thoroughfares of travel to the western Territories, and such as will most likely insure civilization for the Indians and peace and safety for the whites.

Sec. 2. And be it further enacted, That said commissioners are required to examine and select a district or districts of country having sufficient area to receive all the Indian tribes now occupying territory east of the Rocky mountains, not now peacefully residing on permanent reservations under treaty stipulations, to which the Government has the right of occupation or to which said commissioners can obtain the right of occupation, and in which district or districts there shall be sufficient tillable or grazing land to enable the said tribes, respectively, to support themselves by agricultural and pastoral pursuits. Said district or districts, when so selected, and the selection approved by Congress, shall be and remain permanent homes for said Indians to be located thereon, and no person[s] not members of said tribes shall ever be permitted to enter thereon without the permission of the tribes interested, except officers and employees of the United States: Provided, That the district or districts shall be so located as not to interfere with travel on highways located by authority of the United States, nor with the route of the Northern Pacific Railroad, the Union Pacific Railroad, the Union Pacific Railroad Eastern Division, or the proposed route of the Atlantic and Pacific Railroad by the way of Albuquerque.

General Wm. T. Sherman, General Wm. S. Harney, and General C. C. Augur were designated commissioners by the President, as the three Army officers provided for in the statute.

4. In the fall of 1867, the treaty commissioners submitted a proposed treaty to a large number of the leaders and members of the Sioux Indians at Fort Laramie. The negotiations between the commissioners and the leaders and

members of the various bands of the Sioux Tribe of Indians continued in the spring of 1868. Upon the insistence of the Indians certain concessions were made by the commissioners representing the United States. As a result the treaty was agreed to by the portion of the Sioux chiefs, leaders, and members of the tribe (Red Cloud and his band) at Fort Laramie on April 29, 1868, and the treaty was subsequently agreed to at various following dates by Sioux chiefs, leaders, and members of all the remaining bands of the Sioux Tribe.

The plaintiff tribe consists of members of the Sioux Tribe of Indians of the Rosebud Indian Reservation in the State of South Dakota; of the Standing Rock Indian Reservation in the States of North Dakota and South Dakota; of the Pine Ridge Indian Reservation in the State of South Dakota; of the Cheyenne River Indian Reservation in the State of South Dakota; the members of the Sioux Tribe of the Crow Creek Indian Reservation in the State of South Dakota; the members of the Sioux Tribe of the Lower Brule Reservation in the State of South Dakota; the members of the Sioux Tribe of the Santee Indian Reservation in the State of Nebraska; and the Indians of the Sioux Tribe of the Fort Peck Indian Reservation in the State of Montana.

The Sioux Indians who were parties to the 1868 Treaty, *supra*, were those Indians, or the ancestors of the Indians, who still belonged to the same bands designated in the said treaty but who are now, by reason of subsequent acts of Congress and agreements ratified by the Congress, the plaintiffs in this action.

This treaty of 1868, 15 Stat. 635, so far as pertinent here, provided as follows:

> ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.
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> ARTICLE II. The United States agrees that the following district of country, to wit, viz: commencing on *the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence*

along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided. * * *.

ARTICLE IV. The United States agrees, at its own proper expense, to construct at some place on the Missouri river, near the centre of said reservation, where timber and water may be convenient, the following buildings, to wit: a warehouse, a storeroom for the use of the agent in storing goods belonging to the Indians, to cost not less than twenty-five hundred dollars; an agency building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a schoolhouse or mission building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding five thousand dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular sawmill, with

a grist-mill and shingle machine attached to the same, to cost not exceeding eight thousand dollars.

ARTICLE V. The United States agrees that the agent for said Indians shall in the future make his home at the agency building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

* * * * *

ARTICLE VII. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between

said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English eduaction shall befurnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.

ARTICLE VIII. When the head o a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil fo ra living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid, not exceeding in value twenty-five dollars.

And it is further stipulated that such persons as commence farming shall receive instruction from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be needed.

* * * * *

ARTICLE X. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on [or before] the first day of August of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, pantaloons, flannel shirt, hat, and a pair of home-made socks.

For each female over twelve years of age, a flannel skirt, or the goods necessary to make it; a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to

forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the clothing herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of thirty years, while such persons roam and hunt, and twenty dollars for each person who engages in farming, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if within the thirty years, at any time, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the Indians named herein, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery. *And it is hereby expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date.* [Italics ours.] * * *.

ARTICLE XI. In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement *hereby stipulate that they will relinquish all rights to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase.* And they, the said Indians, further expressly agree: [Italics ours.]

1st. That they will withdraw all opposition to the construction of the railroads now being built on the plains.

2d. That they will permit the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home, or travelling, nor molest or disturb any wagon trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. They will never capture, or carry off from the settlements, white women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte river and westward to the Pacific ocean, and they will not in future object to the construction of railroads, wagon roads, mail stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or headman of the tribe.

7th. They agree to withdraw all opposition to the military posts or roads now established south of the North Platte River, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE XII. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI of this treaty.

ARTICLE XIII. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

* * * * *

ARTICLE XV. The Indians herein named agree that when the agency house and other buildings shall be constructed on the reservation named, they will regard

said reservation their permanent home, and they will make no permanent settlement elsewhere; *but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article XI hereof.* [Italics ours.]

ARTICLE XVI. The United States hereby agrees and stipulates that *the country north of the North Platte river and east of the summits of the Big Horn mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians, first had and obtained, to pass through the same;* and it is further agreed by the United States, that within ninety days after the conclusion of peace with all the bands of the Sioux nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed. [Italics ours.]

ARTICLE XVII. It is hereby expressly understood and agreed by and between the respective parties to this treaty that the execution of this treaty and its ratification by the United States Senate shall have the effect, and shall be construed as abrogating and annulling all treaties and agreements heretofore entered into between the respective parties hereto, so far as such treaties and agreements obligate the United States to furnish and provide money, clothing, or other articles of property to such Indians and bands of Indians as become parties to this treaty, but no further.

5. The portion of the land in controversy in this case embraced within the boundaries described in art. 2 of the treaty of 1868 for the absolute and undisturbed use and occupation of the Indians, known as the Black Hills lands, consists of about 7,345,157 acres lying between the 43rd and 46th standard parallels east of the 104th meridian and west of the 103rd meridian and the forks of the Cheyenne River. This land, which it is claimed was taken or misappropriated by the defendant, is designated in the petition as "Class A" land. The other land denominated in the petition as "Class B" land, for which compensation as for a misappropriation is claimed in violation of art. 5 of the treaty of September 17, 1851, and articles 11, 15, and 16 of the treaty of 1868, consists of 25,858,595 acres lying west of the Missouri River

and included in the outer boundaries described in the treaty of September 17, 1851, but exclusive of the area described as the permanent reservation by art. 2 of the treaty of 1868.

Claim is also made for compensation for hunting rights in other land alleged to have been misappropriated, denominated in the petition as "Class C," consisting of 40,-578,123 acres under the treaty of 1851 and the treaty of 1868 lying west and north of the irregular boundary line established by the treaty of 1851 as the western and northern boundaries of the Sioux country.

6. May 11, 1874, the Secretary of War authorized and approved an expedition by Lieut. Colonel Custer into the Black Hills country within the boundaries of the Sioux permanent reservation under the treaty of 1868 for the purpose of exploring the Black Hills country. Prior to that time there had been, about 1861 and again in 1873, some public rumors and agitation with reference to the desirability of the Black Hills—its rich land, fine timber, good climate, and abundant water supply—for white settlements and for mining, because of its gold-bearing possibilities. Prior to and at the time the treaty of 1868 was made the Sioux Indians knew that the Black Hills contained some gold, but the Government had no accurate information about the matter and, up to that time, no exploration of the area had been made. The Custer Expedition left Fort Abraham Lincoln, Dakota Territory (now North Dakota), July 2, 1874, and returned to that Fort August 22, 1874. On this expedition gold was discovered in paying quantities in the Black Hills within the Sioux Reservation. This discovery of gold was made public in dispatches to the public prints August 27, 1874 and thereafter, whereupon a movement of white citizens soon began toward the gold region of the Black Hills and, in 1875, invaded that territory which was within the permanent reservation of the Sioux Tribe of Indians. Upon return of the Custer Expedition in 1874, the Indians of the Sioux Tribe became aware that the Black Hills contained gold in paying quantities. At that time the Black Hills area was surrounded on almost all sides by white settlements; railroads were in operation, the Union Pacific to the south and the Northern Pacific to the north of the Black

Hills; and the Missouri River carried a heavy traffic in steamboats. Thus, facilities were open to white citizens to within comparatively short distances of the Black Hills' gold fields.

7. Before the above-mentioned exploration expedition the Congress in the act of June 23, 1874, 18 Stat. 202, 224, appropriated $25,000 "for presents to the Sioux of the Red Cloud and Whetstone or Spotted Tail Agencies, on condition that said Indians shall relinquish their right, under treaty-stipulations, to hunt in Nebraska." These hunting rights were granted under arts. 11, 15, and 16 of the 1868 treaty and are within the area herein denominated "Class B" land. The commission appointed and authorized to carry out this provision of the act failed in their efforts to secure from the Indians the desired relinquishment. In May 1875 it became imperative, in the opinion of the President, to bring a delegation from the Sioux Tribe to Washington for a preliminary discussion of the matter of purchase by the Government of the hunting rights and the Black Hills section of the Sioux Reservation, and the opening of the Big Horn Mountain country for settlement and mining. Negotiations to that end were renewed by the President in June 1875 when the delegation of the Sioux Indians visited Washington to consider the matter further. This delegation consisted, among other Indians, of Red Cloud, Sitting Bull, Spotted Tail, Lone Horn, and Little Wound. A council was held May 27, 1875. On that day the Secretary of the Interior stated to the Indians, in part, as follows:

> Now I want you to remember another thing. This treaty of 1868 set off a large tract of country for you to occupy, lying in the north part of the United States and away west.
>
> It also provided that you might hunt in all the country north of the North Platte and east of the Big Horn Mountains.
>
> It also provided that you might hunt on the Smoky Hill Fork of the Republican, as long as the buffalo ranged there, so as to justify the chase. This was nearly seven years ago; now the buffalo is not found on the Smoky Hill Fork of the Republican, so as to make it worth while to hunt them. The buffalo north of the North Platte have also been driven away, to such

> an extent, that you cannot find any large quantities there, and the white people are pressing the Government for the privilege of settling also along the Smoky Hill Fork of the Republican.
>
> We cannot stop the white people from going out there. We cannot prevent them from anxiety to take these lands, especially when the buffalo are gone so as to render it undesirable for you to be there.
>
> Now you see the Government has more children than you; you are the Government's children, the children of the Great Father; so are the white people; and the Great Father has to do what is best for all.
>
> I want you to consider these things for the purpose of doing what is best for all the children of the Great Father.

On June 3, 1875, the President held a council with the Indian delegation with reference to the relinquishment by the Sioux Tribe and the acquisition by the Government of certain hunting rights and also the Black Hills portion of the reservation. The President stated to the Indians in part as follows:

> In regard to the Black Hills, I look upon it as very important to them [the Indians] to make some treaty by which, if gold is discovered in large quantities, the white people will be allowed to go there, and they receive a full equivalent for all that is rendered.
>
> If gold is not found there in large quantities, of course the white people won't for the present want to go there, and their country will be left as it is now.
>
> The Secretary of the Interior, and the Commissioner of Indian Affairs, will explain to them hereafter, about what would be probably a fair equivalent to the white people and to them which should be given in case they should surrender the Black Hills, or the portion in which gold may be found. As I pointed out to you before, there will be trouble in keeping white people from going there for gold, if it should be discovered * * * it is possible that strong efforts might not be made to keep them out.
>
> My interest is in seeing you protected, while I have the power to make treaties with you which shall protect you. After you go back to your homes and have been there a sufficient time to talk pretty generally with your people, if I get such a word from you as to make it seem desirable, I will appoint commissioners to go out to confer with you. But it is important to you that

while you are here, you settle the question of the limits of your hunting grounds, and make preliminary arrangements to allow white persons to go into the Black Hills. If it should come to the purchase of the Black Hills or a portion of that country from you I would try to see you get a full equivalent in value, and that that money be paid out in U. S. bonds and deposited here, so that the interest would be drawn twice a year for your benefit, and be expended for your benefit each year as might be agreed upon, and I look upon it as very important to you, and your children, the Indians who come after you, that you encourage all you can, the children attending schools, in speaking English and preparing yourselves for the life of white men.

SECRETARY. The agreement for the relinquishment of the hunting privileges in Nebraska has been drawn up ready for you to sign.

The PRESIDENT. That agreement has been shown to me and I approve of it and would be glad to have you sign it. I will say again whenever the Secretary of the Interior and the Commissioner of Indian Affairs talk to you they talk for me, and if there is any point they cannot quite agree upon they will submit the views of the Indians and their own views to me to decide between them.

One word more that has nothing to do with this—I have always felt, ever since I was a young officer of the Army, a great interest in the welfare of the Indians. I know that formerly they have been abused and their rights not properly respected. Since it has been in my power to have any control over Indian affairs I have endeavored to adopt a policy which should be for your future good, and calculated to preserve peace between the whites and Indians for the present; and it is my great desire, now while I can retain some control over the matter, that the initiatory steps should be taken to secure you and your children hereafter. If you will cooperate with me I shall look always to what I believe is for your best interests. Many of the Indians who accepted [at] an early day what we proposed to you today are now living in houses, have fences around their farms; have school houses, and their children are reading and writing as we do here. * * *

Where there is a population of industrious people who understand how to work, they cannot let their population be pent up and be destroyed while there is territory where they can go and get a subsistence. And what I want to do is to prepare the Indian for

a contingency that will be sure to arise, so that he will be able to live upon the ground and get a support from it. The same as white people. This question that he [Red Cloud] is discussing, is one of sentiment, but it will have to give way before the growth of numbers who are not going to starve, merely out of a sentimental consideration of a title that others may have.

In all this matter, and in all my dealings with the Indians, as I have explained frequently, and once or twice today, I am looking more to their interests than to ours; and I am very anxious that the Government of the United States should pay them in a way that will be of most benefit to them, a full equivalent for all that they have given up, and this is the only way I see a chance of their having in the future a fair equivalent for what they surrender.

You may say to Red Cloud, in answer to what he stated a little while ago, that he did not like to have money collected for what is his, that what we are doing, is paying money which is not his, for buffalo which he claims, but which he has not the right to.

These negotiations resulted in the signing of an agreement by the Indians at their agencies in June 1875 with reference to the hunting rights, the Indians consenting to the agreement upon the condition that the Secretary of the Interior would submit to Congress their claim for an additional $25,000. The Secretary of the Interior complied with the request and submitted the matter to Congress but the Congress did not consider the same. The agreement, which was signed by 34 chiefs and headmen at the Sioux Tribe Agency and 19 chiefs and headmen at the Red Cloud Agency on June 23, 1875, was entitled "Agreement between the United States and the Sioux for the Relinquishment of Hunting Rights in Nebraska", and was as follows:

We, the chiefs and headmen of the Ogallalla, Brule, and other Sioux tribes of Indians, having heard a full explanation of the wishes of the Government of the United States, that we should surrender the privileges contained in the treaty of 1868, to hunt in Nebraska, and in all the country south of our reservation, and all our rights in what is called in said treaty the unceded territory, so far as such territory is contained within the limits of Nebraska, which rights and

privileges are particularly described in articles eleven and sixteen of said treaty; and being fully informed that the sum of twenty-five thousand dollars has been appropriated by Congress for the purchase of presents for the Sioux of the Red Cloud and Spotted Tail agencies, to be received by us in compensation for the relinquishment of the privileges above named, do hereby agree to surrender all privileges of hunting and all other rights and privileges in Nebraska and on the Republican Fork of Smoky Hill River, secured to us by said treaty.

Provided, That we do not surrender any right of occupation of the country situated in Nebraska north of the divide, which is south of and near to the Niobrara River, and west of the 100th meridian; but desire to retain that country for future occupation and use.

Although Congress did not specifically ratify the above-quoted agreement or make its provisions the terms of an act of Congress, the $25,000 mentioned therein was appropriated by Congress and disbursed for the benefit of the Indians in the purchase of cows, horses, harness, and wagons, and the Indians continued freely to use and enjoy the hunting rights and privileges mentioned in the agreement until after the enactment of the act of February 28, 1877, 19 Stat. 254, hereinafter referred to.

8. Prior to and during 1876, trouble arose between the government and certain of the Sioux Indians, particularly with "Sitting Bull" and "Crazy Horse," and their bands, in connection with the survey and construction of the Northern Pacific railroad, referred to in article 11 of the treaty of 1868, and in connection with raids and depredations committed by these bands on white settlers and other Indian tribes in treaty relations with the United States. This trouble culminated in war, which began in March 1876 and ended in September 1877. Jurisdiction over the Sioux Tribe of Indians was surrendered by the Interior Department and transferred to the War Department in December 1875. It is not necessary here to set forth the details as to the military campaigns against certain bands of the Sioux Indians, or as to what occurred in that connection during the years 1876 and 1877. The right or wrong of the policy

pursued by the Government in connection therewith was a political, not a judicial, question.

9. Following the Custer Exploration Expedition into the Black Hills in 1874, as hereinbefore mentioned, and the accounts made public in that year of the discovery of gold in large quantity in that region and of the rich agricultural lands therein, and the fine timber on the lands, public pressure for the opening of the Black Hills country increased. The Government, through its military establishment, endeavored to keep white settlers and gold prospectors out of the Black Hills territory within the Sioux Reservation and, for awhile, it was successful, but it became practically impossible for the Government to expel the intruders or to prevent further intrusions into the Hills. Although the Indians resented the intrusion of the whites into the Black Hills there were no hostilities between the Indians and the white emigrants in this area, doubtless because of the presence of the military, and it does not appear that the Government had any military engagements with the Sioux on account of the Black Hills matter. Throughout the fall and early winter of 1875–1876, troops from Fort Laramie and Fort Lincoln were sent to the Black Hills on several occasions to remove trespassers. By December 1875 the troops had rounded up and taken out practically all persons in the Black Hills, except a comparatively small number who had succeeded in evading the troops. This activity on the part of the Government was kept up until after the so-called cession agreement of September 29, 1876, and the enactment of the act of February 28, 1877. The Government in July and August, 1876, endeavored to blockade all roads leading to the Hills and to drive out those settlers or miners who were in the Black Hills, and to keep others from coming in.

10. April 6, 1872, the Governor of Dakota Territory issued the following proclamation:

> Information having reached the office of the Executive of said Territory, through various sources, to the effect that combinations of men have been and are now being made with a view to entering and occupying the region of country known as the "Black Hills" of Dakota, which is within the Reservation belonging to the Sioux Indians, under the plea that the said Black

Hills country has valuable mineral deposits, as well as quantities of timber fit for lumber.

Now, therefore, I, Edwin S. McCook, Secretary and Acting Governor of the Territory of Dakota, by the direction of the President of the United States, through the Hon. Columbus Delano, Secretary of the Interior, do hereby warn all such unlawful combinations of men, of whatever locality, or under whatever plea or excuse operating, that any such attempt to violate our Treaty stipulations with these Indians, or disturb the peace of the said Territory, by an effort to invade, occupy or settle upon said Reservation, will not only be illegal, and likely to disturb the peace between the United States and said Indians, but will be disapproved by the Government. And if such efforts are persisted in, the Government will use so much of its civil and military as may be necessary to remove from this Indian Territory all persons who go there in violation of law.

September 15, 1874, the Commanding Officer of the military forces in the Dakota Territory issued the following order to the appropriate military officer:

> Should the companies now organizing at Sioux City and Yankton trespass on the Sioux Indian Reservation, you are hereby directed to use the force at your command to burn the wagon-trains, destroy the outfit and arrest the leaders, confining them at the nearest military post in the Indian country. Should they succeed in reaching the interior, you are directed to send such force of cavalry in pursuit as will accomplish the purposes above named.

March 16, 1875, the Adjustant General of the Army, by direction of the President, sent the following instructions to the Commanding Officer of the Dakota Territory:

> The President requests you to make public the following:
>
> "All expeditions into that portion of the Indian Territory known as the Black Hills country must be prevented as long as the present treaty exists. Efforts are now being made to arrange for the extinguishment of the Indian title, and all proper means will be used to accomplish that end. If, however, the steps which are to be taken toward the opening of the country to settlement fail, those persons at present within that Territory without authority must be expelled."

11. June 18, 1875, the Commissioner of Indian Affairs, by direction of the President, gave the commission appointed to negotiate with the Indians for the acquisition by the Government of the Black Hills section of their reservation the following letter of instructions:

> GENTLEMEN: You have been appointed by the Honorable Secretary of the Interior under the direction of the President, as members of the commission to negotiate with the Sioux Indians relative to the procurement of a cession by them of such portion of that country known as the Black Hills, between the North and South Forks of the Big Cheyenne, as the President may determine to be desirable for the Government to purchase for mining purposes, and a relinquishment of their rights to that portion of Wyoming known as the Big Horn Mountains and lying west of a line running from the point where the Niobrara River crosses the east line of Wyoming to the Tongue River, said line to keep distant on the east not less than fifty miles from each of the forts formerly known as Fetterman, Reno, and Kearney, and also of the necessary right of way through their country to reach the country ceded.
>
> By reference to the treaty of 1868, made with these Indians, sections 2 and 16, copy of which is herewith inclosed, you will be informed as to the nature and extent of the respective claims of the Sioux to these tracts of country. That portion of the Black Hills country which lies within the boundaries of Dakota is, without dispute, a part of their permanent reservation. The country mentioned in Wyoming, as described in the sixteenth section of the treaty above referred to, is a portion of "unceded territory." To this the Indians have no claim except for hunting purposes and the exclusion of other people.
>
> By reference to a map of this country, inclosed herewith, you will observe that the cession of the Black Hills, and the relinquishment of the Big Horn country leaves a considerable tract between these two cessions still within the claim of the Indians, as defined in the sixth section. This region, especially along the Powder River, is known as the Sioux hunting ground for buffalo, and is intended still to be preserved to them for that purpose, a passage to it being left open on the north of the North Fork of the Cheyenne, as well as on the south of the South Fork.
>
> The Sioux who are parties to the treaty of 1868, by which the rights involved in this negotiation were as-

sured to them, are now found at six different agencies—Santee, Crow Creek, Cheyenne River, Standing Rock, Red Cloud, and Spotted Tail. They number not far from 35,000. There are also probably not far from 3,000 to 5,000 who roam over the Black Hills country, and to the north and west of it, who have not been enrolled at any agency, and who were only indirectly represented at the making of the treaty of 1868. It is deemed necessary in order to bring this matter fairly before the large body of Indians interested, that a portion of the commission shall visit them at their respective agencies, and procure such interviews as may be possible with the roaming Indians, and lay definitely before them all the wishes of the Government and their own necessities and interests as involved in the question of the desired cession, and invite the Indians at their agencies to send representative men to a general council, to be held at as early a day as practicable at Fort Sully, on the Missouri River; which general council all the members of the commission are expected to attend.

In negotiating with these ignorant and almost helpless people you will keep in mind the fact that you represent them and their interests not less than those of the Government and are commissioned to secure the best interests of both parties, so far as practicable. Great care should be taken in your interviews not only to secure proper and exact interpretations of the communications passing between you, but also to satisfy the Indians that their words are fairly conveyed in English. Rev. S. D. Hinman, a member of your Commission, is entirely competent to give an exact rendering both of the English and of the Sioux. It will be well also in every case to employ the services of such an interpreter as the Indians may select, so as to secure between the services of the two not only exactness but the entire confidence of the Indians.

In presenting this subject to the Indians they should first of all be assured of the kindly intentions of the President and the Government toward them. They should, if possible, be made to understand that this effort on the part of the Government to procure a portion of their country originated solely in a desire for the continuance of peace between them and the whites; that since the opinion that gold is to be found in the Black Hills has prevailed among the people it has been almost impossible to prevent white persons from entering their country, and that there is no little danger that, spite of all efforts to the contrary, some evilly-disposed

persons will break through the line, and that conflict and blood will ensue.

You will also assure the Indians that it is not the wish of the Government to take from them any of their property or rights, without returning a fair equivalent therefor, and that you have come, representing their Great Father, to fix upon an equivalent which shall be just both to them and to the white people.

You will be careful in your negotiations to keep constantly impressed upon the minds of the Indians that any agreement entered into at the council is to be brought back to the President, and by him to be submitted to Congress for consideration by that body; and that, until the contract has received the approval of Congress, it can not be binding upon either party.

Respecting the right of way, this should be left to the discretion of the President, as to the routes to be selected, and as to any restrictions to be imposed upon parties using the routes. * * *

12. This commission held councils with the leaders and members of the Sioux Tribe in their country, but was unable to arrive at any terms with the Indians for the relinquishment or sale of the Black Hills. The efforts of the commission to secure the results desired by the Government were fruitless, and, on June 29, 1875, the commission submitted to the Indians their final propositions:

(1) To purchase the license to mine and, also as incidental thereto, the right to grow stock and to cultivate the soil in the country known as the Black Hills, beginning at the junction of the North and South Forks of the Cheyenne River and embracing all the territory between said rivers lying west of said junction to the one hundred and fourth meridian of longitude west from Greenwich, the United States agreeing to pay therefor the sum of $400,000 per annum; the United States reserving the right to terminate said license at any time by giving two years' notice by proclamation, and payment of the full amount stipulated for the time the license may continue; and at the expiration of said term, all private property remaining upon said territory shall revert to the Sioux Nation; and such an amount of said $400,000 as the Congress shall determine, not less than $100,000 annually, shall be expended for objects beneficial for their civilization, and the remainder of

said annual sum shall in like manner be expended for their subsistence; or, if the Sioux Nation prefers it:

(2) To purchase the Black Hills, as above described, from the Sioux Nation and to pay them for their interest therein the sum of $6,000,000 in fifteen equal annual instalments; the said sums to be annually appropriated for their subsistence and civilization, not less than $100,000 of which shall be annually expended for purposes of civilization.

(3) The commissioners further proposed to the Indians to purchase all that portion of what was known as the Big Horn country in Wyoming lying west of a line beginning at the northwest corner of the State of Nebraska and running in a northwesterly direction to the Yellowstone River where the one hundred and seventh meridian west of Greenwich crosses said river, and to pay the Indians for their interest therein the sum of $50,000 annually for ten years, amounting to $500,000, to be paid in cows and other livestock, and in such implements of husbandry as should be convenient to stockgrowing and as may be deemed advisable by the President.

The Indians refused to consider the question of cession of that portion of Wyoming known as the Big Horn country on the ground that it was valuable to them to roam over and hunt upon and would not consent to surrender it. The commission, having serious doubts whether there was gold in the Black Hills in sufficient quantity to make mining profitable, submitted the above-mentioned Black Hills proposition in the alternative. The Indians refused the offer. The commission so reported to the President.

13. Theretofore, on March 27, 1875, by direction of the President, Walter P. Jenney, mining engineer, was instructed and authorized to make a survey of the Black Hills and report on the mineral, the timber, and the agricultural resources thereof. On November 8, 1875, he submitted a report as follows:

> SIR: In compliance with your request for preliminary statements respecting the mineral and agricultural resources of the Black Hills in Dakota, and the work done under my direction during the past summer in exploring and mapping that portion of the Territory, I have the honor to make the following report in brief: * * *

Without entering into details regarding the manner of working or of incidents in the history of the expedition; how on reaching the hills, I found miners prospecting on French Creek; how after a month's work gold was found in paying quantities on Spring and Rapid Creeks; how the miners poured by hundreds into the hills, and accompanying me, gave me great assistance in prospecting the country; I will briefly state such results of the work as will tend to throw light on the probable future value of the region.

That portion of the Black Hills which may be designated as Harney's Peak gold field is almost wholly in Dakota, and extends about fifty miles north and south with an average breadth of nearly twenty miles, covering an area of not less than eight hundred square miles. The valuable gold-deposits, however, are found in the valleys of the streams which drain that area, the gold being derived from the disintegration of the quartz-ledges, which are very numerous in the rocks of that region.

The most extensive and valuable deposits of auriferous gravel discovered during the past season were in the valleys of Spring and Rapid Creeks and their tributaries, where, in almost every case, the gravel-bars are very advantageously situated for working, and where many natural circumstances contribute materially to the profitable extracting of the gold which they contain.

Timber of suitable size and quantity for the construction of flumes and sluices is abundant; the water supply is, in most localities, ample; and the fall of the streams sufficiently great to enable the water to be readily carried above the level of even the more elevated bars and deposits of gravel.

While as yet there have been discovered in the Black Hills no deposits of gravel sufficiently rich in gold to be profitably worked in the primitive manner with pan or rocker, yet there are many bars in the Harney's Peak field, especially upon Spring Creek, the forks of Castle and Rapid Creeks, and the valleys of those mountain streams, which, when skillfully worked by gangs of miners with sluices, will yield a good return for the labor employed and the moderate capital required to be invested. But little could be done in a single season in prospecting the numerous segregated quartz veins of this region, some of which undoubtedly contain gold. I have procured abundant samples for testing their value by assay.

The Bear Lodge gold field, situated in the extreme northwestern portion of the hills, is wholly in Wyoming, and entirely separated from the Harney Peak region. It does not exceed fifty square miles in area; the gold deposits are small compared with those on Rapid Creek, and are remarkable for the absence of quartz in the gravel, the gold being derived from the disintegrations of feldspar porphyry, carrying irregular masses of iron and manganese ore.

It is difficult to determine the agricultural resources or climate of the Black Hills by the observation of a single season, especially as I could gain but little information respecting the severity of the winters or the prevalence of early and late frosts. The Black Hills rise like an island from an ocean of grass covered and treeless plains, watered by occasional and scanty supplies of rain; and the winds in passing over these plains gather some moisture which they part with as rain on being chilled by contact with the colder and more elevated region of the central portions of the hills. The result of this is the prevalence of frequent though not heavy rain-falls, giving to the hills a most peculiar climate. There is scarcely a day from May to August without one or two showers, yet, owing to the dryness of the atmosphere, the climate was found to be very healthy. During the past season, after August 1, very little rain was experienced, and some of the smaller streams contained water only in pools. That this remarkable rain-fall, in a region where the average fall does not exceed ten inches for the whole year, was not the exhibition of a peculiarly wet season, I can only judge by observation on the growth of the plants and trees.

The abundance of trees and the coarseness of their grains, as well as the growth of plants on dry hillsides exposed to both sun and wind, tend to show that the season which I witnessed was by no means a very unusual one, though the amount of rain may have been somewhat greater than usual.

The area of land suitable for cultivation is, from the mountainous character of the region, limited as compared with the vast area embraced in the hills, but the soil along the streams and in most of the valleys is deep and fertile, and will be sufficient for the requirements of the population which the hills will support as a stock-raising community. *I should judge from the observations* which I have had the opportunity to make that at

least one-twentieth of the three thousand square miles embraced in the Black Hills may be fairly described as arable lands, and that among these lands lying near the streams and continuous through the hilly country are large tracts of land forming the slopes of the hillsides which, while not arable, will afford fine grazing, thus largely enhancing the value of the lands to which they are contiguous.

Among the rocky areas of the Harney's Peak range, and in the northern portion of the hills, there are regions where the grasses are comparatively wanting, but generally, throughout the whole area of the hills a luxuriant growth of the finest grasses is to be found, even covering the ground under the shade of the pine trees upon the elevated divides between the streams.

The abundance and fine quality of the grasses and the shelter afforded to stock by the densely timbered slopes and deep valleys will make it a region well adapted to stock-raising purposes.

The timber of the hills is a variety of pine known as yellow or heavy pine; the grain of the wood is straight, rather coarse, splitting readily, and where the trees have escaped the action of fires and violent gales, good straight logs, free from knots, and from 40 to 60 feet in length, and from 12 to 24 inches in diameter, can be obtained in abundance. Spruce of good quality is found among the cañons in the interior, and white birch, oak, and elm, of medium size, among the hills on the eastern slope.

The water throughout the hills is excellent in quality, mostly derived from springs among the limestone, or the granitic or schistose rock; only in localities among the foothills is it contaminated by alkali.

14. In his annual report for the fiscal year 1875, the Commissioner of Indian Affairs, reporting on the Black Hills condition, stated as follows:

The public excitement mentioned in my last report, occasioned by the discovery of gold in that portion of the Sioux reservation known as the Black Hills country, increased to such a degree in the opening of the spring season as to require action looking toward the purchase of this country from the Sioux proprietors and the opening up of the Big Horn Mountain country for *settlement and mining*. For this purpose, as well as for completing the negotiation for the relinquishment by the Sioux of their hunting rights in Nebraska and

Kansas, a large delegation of this tribe, composed of representatives from those agencies, was brought to Washington in May last for an interview with the President. It was not expected that this interview could conclude the purchase, but that it would prove a preliminary step by which the Sioux tribe would become acquainted with the wishes of the Government and its purposes relative to their own necessities and interests. Accordingly, at the request of the delegation, the President sent a commission, of which Hon. W. B. Allison, of the United States Senate, was made chairman, to negotiate at a general council of the tribe in their own country. The commission has not yet submitted its report, but I am informed that the negotiations have failed on account of a wide disagreement as to the value of the rights to be relinquished by the Sioux. Meanwhile, notwithstanding the stringent prohibitory orders by the military authorities, and in the face of the large military force which has been on duty in and around the Hills during the summer, probably not less than a thousand miners, with the number rapidly increasing, have made their way into the Sioux country. A mining association has been organized, laws and regulations have been adopted for mutual protection, and individual claims staked out, in the right to which they expect hereafter either to be protected by the Government or to protect themselves.

In this serious complication there seems to be but one alternative for the Government; either to so increase the military force and adopt such summary means as will insure a strict observance of the treaty rights of the Sioux by preventing all intrusion, or to renew the effort of negotiation. However unwilling we may be to confess it, the experience of the past summer proves either the inefficiency of the large military force under the command of such officers as General Sheridan, Terry, and Crook, or the utter impracticability of keeping Americans out of a country where gold is known to exist by any fear of orders or of United States cavalry, or by any consideration of the rights of others.

The occupation and possession of the Black Hills by white men seems now inevitable, but no reason exists for making this inevitability an occasion of wrong or lasting injury to the Sioux. If an Indian can be possessed of rights of country, either natural or acquired, this country belongs for occupation to the Sioux; and if they were an independent, self-supporting people,

able to claim that hereafter the United States Government should leave them entirely alone, in yearly receipt of such annuities only as the treaty of 1868 guarantees, they would be in a position to demand to be left in undisturbed possession of their country, and the moral sense of mankind would sustain the demand; but unfortunately the facts are otherwise. They are not now capable of self-support; they are absolute pensioners of the Government in the sum of a million and a quarter of dollars annually above all amounts specified in treaty stipulations. A failure to receive Government rations for a single season would reduce them to starvation. They cannot, therefore, demand to be left alone, and the Government granting the large help which the Sioux are obliged to ask, is entitled to ask something of them in return. On this basis of mutual benefit the purchase of the Black Hills should proceed. If, therefore, all attempts at negotiation have failed on the plan of going first to the Indians, I would respectfully recommend that legislation be now sought from Congress, offering a fair and full equivalent for the country lying between the North and South Forks of the Cheyenne River, in Dakota, a portion of which equivalent should be made to take the place of the free rations now granted.

Survey of the Black Hills—
Their Value to the Indians.

In order to provide for the question of a fair equivalent for this country, by direction of the President, a topographical and geological survey of the Black Hills was ordered, the preliminary report of which, by Walter P. Jenney, mining engineer in charge, will be found herewith. It furnishes many interesting and important facts respecting a region hitherto almost unknown. Professor Jenney and his assistants are entitled to large credit for the conscientious diligence and thoroughness, which are apparent at every point in their work. The aid rendered by the War Department, by the courtesy of the General of the Army, and by Col. R. I. Dodge, commanding the escort, has been invaluable to the success of the survey. Without such aid, no satisfactory results could have been obtained, on account of the limited funds available for this purpose. The report confirms, in a large degree, the statements of travelers and explorers and the reports of General Custer's military expedition of last year, and shows a gold field with an area of eight hundred square miles, and around

this gold region, principally to the north, an additional area within the Black Hills country of three thousand square miles of arable lands, and this latter embracing along its streams an area equal to two hundred square miles finely adapted to agriculture, while the hill sides and elevations contiguous thereto are equally adapted to purposes of grazing, making the whole area of three thousand square miles of timber, grazing, and arable land of great value for agricultural purposes.

According to the findings of this report, if there were no gold in this country to attract the white man, and the Indians could be left to undisturbed occupation of the Black Hills, this region, naturally suited to agriculture and herding, is the one of all others within the boundaries of the Sioux reservation best adapted to their immediate and paramount necessities. I doubt whether any land now remaining in the possession of the General Government offers equal advantages; but it will be found impracticable to utilize the country for the Sioux. So long as gold exists in the same region, the agricultural country surrounding the gold fields will be largely required to support the miners, and to attempt to bring the wild Sioux into proximity to the settlers and miners would be to invite provocations and bloody hostility.

These facts respecting the country which the Sioux seem about to be compelled to surrender, for the sake of promoting the mining and agricultural interests of white men, have an important bearing upon the question of compensation which shall be allowed for their lands; for it must be borne in mind that unless the Sioux Nation becomes extinct, of which there is no probability, the time is close upon them when they must have just such an opportunity for self-support as that which is now known to be offered in the Black Hills; and if, for the want of another such country, they are obliged to begin civilization under increased disabilities, humanity as well as equity demands that such disability shall be compensated by increased aid from the Government; and to avoid the perils of future legislation, or want of legislation, the compensation should be provided for and fixed at the time when we are taking away their valuable lands.

The fact that these Indians are making but little if any use of the Black Hills has no bearing upon the question of what is a fair equivalent for the surrender of these rare facilities for farming and grazing. They

are children, utterly unable to comprehend their own great necessities just ahead; they cannot, therefore, see that the country which now only furnishes them lodge-poles and a few antelope has abundant resources for their future wants, when they shall cease to be barbarous pensioners upon the Government and begin to provide for their own living. Their ignorance of themselves and of true values makes the stronger appeal to our sense of what is right and fair.

The true equivalent to be offered the Sioux, as helpless wards of the Government, for the Black Hills will be found by estimating what eight hundred square miles of gold fields are worth to us, and what three thousand square miles of timber, agricultural, and grazing lands are worth to them.

15. In December 1875 the President, in his annual message to Congress, recommended that, because of an anticipated large increase in emigration to the Black Hills, the Congress should "adopt some measures to relieve the embarrassment growing out of the causes mentioned." And, in this message, the President stated in part as follows:

> The discovery of gold in the Black Hills, a portion of the Sioux Reservation, has had the effect to induce a large emigration of miners to that point. Thus far the efforts to protect the treaty rights of the Indians in that section have been successful, but the next year will certainly witness a large increase of such emigration. The negotiations for the relinquishment of the gold fields having failed, it will be necessary for Congress to adopt some measures to relieve the embarrassment growing out of the causes named. The secretary of the interior suggests that the supplies now appropriated for the sustenance of that people being no longer obligatory under the treaty of 1868, but simply a gratuity, may be issued or withheld at his discretion.

16. The Secretary of Interior in his annual report to Congress for 1875 stated as follows:

> The failure of the negotiations by the commissioners necessitates the adoption of some measures to relieve the department of the great embarrassment resulting from the evident determination of a large number of citizens to enter upon that portion of the Sioux Reservation to obtain the precious metals which *the official* report of the geologist sent out by the Government

shows to exist therein. The very measures now taken by the Government to prevent the influx of miners into the Black Hills, by means of the display of military force, operate as the surest safeguard of the miners against the attacks of Indians. The army expels the miners, and, while doing so, protects them from Indians. The miners return as soon as the military surveillance is withdrawn, and the same steps are taken again and again. Some of the miners have brought suits against the military officers for false imprisonment, and much embarrassment to both army and the interior department is the result. The preliminary report of Professor Jenney, which accompanies the report of the Indian commissioner, in regard to the geological and agricultural wealth of the Black Hills, indicates clearly the great temptation held out to miners and emigrants to occupy that country, and will greatly enhance the difficulties which have already surrounded the question of protecting the Sioux in their treaty rights in that territory. The opening of the next summer season will undoubtedly witness a great increase of emigration thither, and the question urges itself upon the attention of the department and of Congress for early solution. It is true that the Indians occupy that reservation under the provisions of a treaty with the United States. It is also true, as a general proposition, that treaties should be maintained inviolate, and the Indians protected in their rights thereunder. But for two years the Government has been appropriating about one million two hundred and sixty thousand dollars for the subsistence of Sioux of various tribes, which amount is a gratuity that the Government is under no obligations to give them, and for which it receives no compensating advantage. The amount thus appropriated is 5 percent per annum of $25,000,000, which the Government is giving without an equivalent. This amount must be given them for some years to come, or they will starve. It is submitted, therefore, under these circumstances, for the consideration of Congress, whether it would not be justifiable and proper to make future appropriations for supplies to this people, contingent on the relinquishment of the gold fields in the Black Hills and the right-of-way thereto.

17. The treaty of 1868 (finding 4), as its provisions show, contemplated that the Indians, with the assistance agreed to be rendered by the Government, would soon become self-

supporting on the reservation. The United States agreed in that treaty to equip them for farming and to furnish them all needed facilities and assistance in that connection, to furnish them educational facilities for not less than 20 years, and for a period of 30 years to furnish each Indian with articles of clothing, etc., and to pay the sum of ten dollars for each Indian "while such persons roam and hunt," and twenty dollars "for each person who engages in farming" to be used for the purchase of such articles as from time to time the conditions and necessities of the Indians might indicate to be proper. In addition to all the other provisions of the treaty, the United States agreed, in article 10, to appropriate and expend annually such sum as might be necessary for the subsistence of the Indians of the Sioux Tribe on the reservation for a period of four years. This last-mentioned provision of the treaty was fulfilled and finally discharged by the appropriation and disbursement of $1,314,000 under the act of February 14, 1873, 17 Stat. 437, 456, for the fiscal year ending June 30, 1874. The total appropriated in fulfillment of the subsistence provisions under the treaty was $5,295,761.91. The Sioux Indians had not become self-sustaining and, notwithstanding there no longer remained any treaty obligation on the part of the Government to support the Indians, the Congress continued to appropriate and disburse public funds for their sustenance.

The act of June 22, 1874, 18 Stat. 146, 167, making appropriations for the year ending June 30, 1875, appropriated $1,100,000 for subsistence of the Indians of the tribe then numbering more than 30,000 persons. Likewise, under the act of March 3, 1875, 18 Stat. 420, 441, $1,100,000 was appropriated and disbursed for sustenance for the fiscal year ending June 30, 1876; and under act of April 6, 1876, 19 Stat. 28, a deficiency appropriation of $150,000 was made and disbursed for subsistence of the Sioux Indians for the fiscal year ending June 30, 1876. The total of these last-mentioned appropriations for food for the necessary subsistence of the Indians of the Sioux Tribe was $2,350,000.

In the act of August 15, 1876, 19 Stat. 176, (p. 192), making appropriations for the current contingent expenses

of the Indian Department for the fiscal year ending June 30, 1877, Congress made the necessary appropriations for fulfilling all the existing provisions of the Sioux Treaty of 1868, and, with reference to the matter of subsistence of the Indians of the Sioux Tribe, appropriated the further sum of $1,000,000, and with respect thereto, enacted as follows:

> For this amount, for subsistence, including the Yankton Sioux and Poncas, and for purposes of their civilization, one million dollars: *Provided*, That none of said sums appropriated for said Sioux Indians shall be paid to any band thereof while said band is engaged in hostilities against the white people; and hereafter there shall be no appropration made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude and shall also grant right-of-way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for, and provided for by said treaty of eighteen hundred and sixty-eight, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate; and the further sum of twenty thousand dollars is hereby appropriated to be expended under the direction of the President of the United States for the purpose of carrying into effect the foregoing provision: *And provided also*, That no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self-supporting.

18. August 24, 1876, the President appointed another commission to negotiate with the Sioux Tribe for the desired cessions and stipulations as provided in the act of 1876, *supra*. This commission proceeded to the Sioux country to

conduct negotiations with the Sioux tribes and bands at the different agencies on the Great Sioux Reservation and submitted to them a proposed agreement conforming to provisions of the act of Congress; it duly explained to the Indians the intent, meaning, and effect of the act of Congress and the proposed agreement, in connection with the fact that the subsistence provisions of article 10 of the treaty of 1868 had long since been fulfilled and had become extinguished, and further stated to the Indians that there no longer rested upon the Government any obligation to appropriate and disburse large sums annually for their subsistence. The result was that the commission was unable to obtain the assent of three-fourths of the male adult Indians of the tribe to this proposed agreement. More than 90 percent of the Indians refused to assent. The chiefs, headmen, and less than ten percent of the male adult Indians of the tribe at the different agencies assented to and signed the agreement on dates ranging from September 20 to October 27, 1876.

The record of the negotiations of the commission with the Indians of the Sioux Tribe discloses and shows that it was impossible for the commission to arrive at an agreement in strict conformity with article 12 of the treaty of 1868 for the relinquishment or sale to the Government of the Black Hills for the reason that more than 90 percent of the Indians refused to sell or lease the Black Hills and relinquish their hunting rights to the Government at any price. The male adult members of the tribe over eighteen years of age constituted about 25 percent of the entire population of the tribe. Some of the Indians indicated a willingness to lease the mining rights in the Black Hills to the Government for a consideration of $70,000,000 or for full subsistence for every Sioux Indian (then numbered between 20,000 and 30,000 persons) from that date, so long as the tribe existed.

The record, as a whole, does not justify a finding that the chiefs, headmen, or the Indians of the Sioux Tribe who assented to and signed the agreement, which became the act of February 28, 1877, hereinafter mentioned, did so under duress, or that the commission used undue influence or imposed upon the Indians who did sign the agreement.

19. The agreement as thus consummated, which so far as the assent of the tribe was concerned was the best the Government could do in the circumstances, was, in due course, submitted by the commission, with its journal and minutes, to the President and by him transmitted to Congress on December 22, 1876 (Sen. Exec. Doc. 9, 44th Congress, 2d sess., Cong. Doc. Series 1718), with the statement that "I ask your especial consideration of these Articles of Agreement as among other advantages to be gained by them is the clear right of citizens to go into a country of which they have taken possession and from which they cannot be excluded." In due course Congress made the agreement so transmitted a part of the act approved February 28, 1877, 19 Stat. 254, as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That a certain agreement made by George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bulis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, with the different bands of the Sioux Nation of Indians, and also the Northern Arapaho and Cheyenne Indians, be, and the same is hereby, ratified and confirmed: *Provided*, That nothing in this act shall be construed to authorize the removal of the Sioux Indians to the Indian Territory and the President of the United States is hereby directed to prohibit the removal of any portion of the Sioux Indians to the Indian Territory until the same shall be authorized by an act of Congress hereafter enacted, except article four, except also the following portion of article six: "And if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and comfortable dwelling house" said article not having been agreed to by the Sioux Nation; said agreement is in words and figures following, namely: "Articles of agreement made pursuant to the provisions of an Act of Congress entitled 'An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,'" approved August 15, 1876, by and between George W. Manypenny, Henry B. Whipple, Jared W. Daniels,

Albert G. Boone, Henry C. Bulis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, and also the Northern Arapahoes and Cheyennes, by their chiefs and headmen, whose names are hereto subscribed, they being duly authorized to act in the premises.

ARTICLE 1. The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

ARTICLE 2. The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

ARTICLE 3. The said Indians also agree that they will hereafter receive all annuities provided by the said treaty of 1868, and all subsistence and supplies which may be provided for them under the present or any future act of Congress, at such points and places on the said reservation, and in the vicinity of the Missouri River, as the President of the United States shall designate.

ARTICLE 4. The Government of the United States and the said Indians, being mutually desirous that the latter shall be located in a country where they may eventually become self-supporting and acquire the arts of civilized life, it is therefore agreed that the said Indians shall select a delegation of five or more chiefs and principal men from each band, who shall, without delay, visit the Indian Territory under the guidance and protection of suitable persons, to be appointed for that purpose by the Department of the Interior, with a view to selecting therein a permanent home for the said Indians. If such delegation shall make a selection which shall be satisfactory to themselves, the people whom they represent, and to the United States, then the said Indians agree that they will remove to the country so selected within one year from this date. And the said Indians do further agree in all things to submit themselves to such beneficent plans as the Government may provide for them in the selection of a country suitable for a permanent home, where they may live like white men.

ARTICLE 5. In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef (or in lieu thereof, one-half pound of bacon), one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. Rations shall, in all cases, be issued to the head of each separate family; and whenever schools shall have been provided by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school. Whenever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor

(the aged, sick, and infirm excepted); and as an incentive to industrious habits the Commissioner of Indian Affairs may provide that such persons be furnished in payment for their labor such other necessary articles as are requisite for civilized life. The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.

ARTICLE 6. Whenever the head of a family shall, in good faith, select an allotment of land upon such reservation and engage in the cultivation thereof, the Government shall, with his aid, erect a comfortable house on such allotment; and if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and comfortable dwelling house.

ARTICLE 7. To improve the morals and industrious habits of said Indians, it is agreed that the agent, trader, farmer, carpenter, blacksmith, and other artisans employed or permitted to reside within the reservation belonging to the Indians, parties to this agreement, shall be lawfully married and living with their respective families on the reservation; and no person other than an Indian of full blood, whose fitness, morally or otherwise, is not, in the opinion of the Commissioner of Indian Affairs, conducive to the welfare of said Indians, shall receive any benefit from this agreement or former treaties, and may be expelled from the reservation.

ARTICLE 8. The provisions of said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life.

ARTICLE 9. The Indians, parties to this agreement, do hereby solemnly pledge themselves, individually and collectively, to observe each and all of the stipulations herein contained, to select allotments of land as soon as possible after their removal to their permanent home, and to use their best efforts to learn to cultivate

the same. And they do solemnly pledge themselves that they will at all times maintain peace with the citizens and Government of the United States; that they will observe the laws thereof and loyally endeavor to fulfill all the obligations assumed by them under the treaty of 1868 and the present agreement, and to this end will, whenever requested by the President of the United States, select so many suitable men from each band to cooperate with him in maintaining order and peace on the reservation as the President may deem necessary, who shall receive such compensation for their services as Congress may provide.

ARTICLE 10. In order that the Government may faithfully fulfill the stipulations contained in this agreement, it is mutually agreed that a census of all Indians affected hereby shall be taken in the month of December of each year, and the names of each head of family and adult person registered; said census to be taken in such manner as the Commissioner of Indian Affairs may provide.

ARTICLE 11. It is understood that the term reservation herein contained shall be held to apply to any country which shall be selected under the authority of the United States as the future home of said Indians.

This agreement shall not be binding upon either party until it shall have received the approval of the President and Congress of the United States.

20. Thereupon, the $1,000,000 conditionally appropriated by Congress in the act of August 15, 1876, *supra*, for subsistence of the Indians for the fiscal year ending June 30, 1877, was expended and disbursed for that purpose, and Congress has, annually, ever since that time appropriated and is still appropriating so far as is necessary, in conformity with and in fulfillment of the provisions and stipulations of the act of February 28, 1877, as embodied in article 5, the sums necessary for subsistence of each individual of the Sioux Tribe.

By article 5 of that act, the Government assumed an obligation to continue to appropriate and expend such sums as should be necessary for such subsistence "until the Indians are able to support themselves" in return for the Black Hills and hunting rights acquired, and, also added 900,000 acres of grazing land to the permanent reservation. The total of the sums annually appropriated by the Con-

gress to June 30, 1926, in fulfillment of this purpose, for subsistence of the Indians of the Sioux Tribe, including the $3,055,450.53 for the fiscal years 1875 and 1876, was $39,993,962.50, for none of which any legal obligation rested upon the Government other than that assumed and provided for in the act of February 28, 1877. Amounts appropriated for subsistence subsequent to 1926 bring this total to approximately $43,000,000.

21. By the act approved March 2, 1889, 25 Stat. 888, 896, Congress directed that the Great Sioux Reservation should be divided into separate reservations of described metes and bounds; that all lands in the reservation (which reservation did not then include the Black Hills territory acquired by the Government under the acts of August 15, 1876, and February 28, 1877,) outside the limits of the diminished reservation therein provided for should be restored to the public domain and sold or disposed of for the benefit of the Indians in the manner therein provided, and section 19 provided as follows:

> That all the provisions of the said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, and the agreement with the same approved February twenty-eighth, eighteen hundred and seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding.

Section 28 provided "That this act shall take effect only upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of

this act; and upon failure of such proof and proclamation this act becomes of no effect and null and void."

This act was accepted by the Indians of the Sioux Tribe as therein provided, and such acceptance was proclaimed by the President February 10, 1890, 26 Stat. 1554, as required.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The claim presented in this case by the Sioux Tribe is for just compensation for the alleged taking for public purposes or the misappropriation by the defendant, by the act of Congress of February 28, 1877, 19 Stat. 254, of land and rights in land, amounting to 73,781,826.19 acres, without the payment of compensation therefor and contrary to and in violation of articles 2, 12, 15, and 17 of the treaty concluded April 29, 1868, ratified February 16, 1869, and proclaimed February 24, 1869, 15 Stat. 635 (finding 3), and certain provisions of the treaty of September 17, 1851.

The record is voluminous, but there is no serious dispute concerning the essential facts pertinent to the legal phase of the claim presented as to what the Government did and the reasons therefor. Plaintiff Indians say that because article 2 of the treaty granted the property to them for their "absolute and undisturbed use and occupation" and that because the Government through an act of Congress in 1877 acquired the property without the consent of three-fourths of the male adult Indians having been first obtained, as provided in article 12 of the treaty, there was a "taking" of the property and a "misappropriation" thereof, and relies upon *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, and *United States* v. *Creek Nation*, 295 U. S. 103. The defendant says that the Congress acted within the scope of its plenary authority over Indian tribes, and relies upon *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

If the lands or other property rights of plaintiff were misappropriated or taken by the United States in violation of the treaty of 1868, and contrary to the authority which

Congress possessed under the treaty and the law governing the rights of the parties, without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking, plaintiff is entitled to recover. But if, under the circumstances disclosed by the record, Congress acted within the limits of its authority under the law and the treaty in acquiring the lands and hunting rights for which it made compensation, the plaintiff is not in our opinion entitled under the terms of the jurisdictional act to recover.

The facts and circumstances narrow the legal issue between the parties to the question whether under the treaties of 1851 and 1868 and the act of February 28, 1877, the plaintiff tribe has any legal and enforceable claim within the meaning of section 1 of the jurisdictional act upon which the court has authority to inquire into the wisdom of the policy pursued by the Government, pursuant to which the acts of August 15, 1876, and February 28, 1877, were enacted, and the adequacy of the consideration assumed and paid by defendant for the property acquired under those acts. Section 1 of the jurisdictional act (41 Stat. 738) authorizes this court to adjudicate "legal and equitable" claims and to determine the amount, "if any, due said tribe from the United States" upon such legal and equitable claims "under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe."

The facts summarized show that by article 2 of the treaty of April 29, 1868, with plaintiff tribe, the Black Hills section of South Dakota here involved, and comprising about 7,345,167 acres, was included in the area set apart for the absolute and undisturbed use and occupation of the tribe, and, in addition, certain hunting privileges were granted by articles 11, 15, and 16 with reference to other lands. Under this treaty the Government assumed an obligation, among others, to provide food for the subsistence of all the Indians of the tribe for a period of four years. The population of the tribe was between twenty and thirty thousand. This obligation was fulfilled through the necessary appropriations

annually for the term stipulated and was finally discharged by the appropriation of $1,314,000 on February 14, 1873, for subsistence for the year ending June 30, 1874,—the total amount appropriated for the four years being $5,295,761.95. After that no legal obligation rested upon the Government to expend public funds for subsistence of the tribe. The Indians were at that time incapable of supporting themselves.

It was known by the Indians that the Black Hills portion of the reservation contained some gold before and at the time the treaty of 1868 was made, but it was not known or believed by the Government that this area contained gold in paying quantities. The fact that the Black Hills contained gold was not known to the general public until after the results of the Custer Exploration Expedition into the Black Hills in the summer of 1874 had been published. Immediately thereafter there was a tide of emigration of settlers and miners to the Black Hills region in ever-increasing numbers. The Government, through the President and the military department, made serious efforts to prevent the intrusion and to expel the intruders, but these efforts were only partially successful. Public pressure for the opening of the Black Hills for settlement and mining became very strong. The situation in 1875 was such that the Government believed serious conflicts would develop between the settlers and the Government, and between the settlers and the Indians. In May 1875 a delegation of Sioux Indians was called to Washington for a preliminary discussion with the President, the Secretary of the Interior, and the Commissioner of Indian Affairs looking to the cession or sale by the Sioux Tribe to the United States of the hunting rights outside the permanent reservation and the sale of the Black Hills portion of their reservation, (see finding 6). Later, a commission was appointed by the President, June 18, 1875, to continue negotiations in the Sioux country, but it was unsuccessful in its efforts to negotiate terms for cession of the hunting rights and the Black Hills area to the Government and its mission failed. A full report was made to the President. In December 1875 the President, in his annual message to Congress, recommended that because of

an anticipated large increase in emigration to the Black Hills, and the difficulties of the Government in that connection, the Congress should adopt some measure to relieve the embarrassment growing out of the causes mentioned, and the attention of Congress was brought to the fact that the last two annual appropriations for the fiscal years 1875 and 1876 (which amounted to $2,350,000) for the subsistence of the Indians of the Sioux Tribe had been made gratuitously, the treaty obligation having been discharged by the appropriation made in 1873 for the fiscal year 1874.

At that time the Government was having and continued, through 1876 and 1877, to have trouble with certain of the Sioux Indians, particularly Sitting Bull and Crazy Horse and their bands numbering about sixty lodges and approximately six hundred warriors, in connection with the survey and construction of the Northern Pacific Railroad through the hunting grounds of the tribe, and raids by those bands on white settlers and other Indians. On this account war between the Government and these bands and other unfriendly Sioux Indians developed in March 1876 and ended September 10, 1877, with heavy loss to both the Government and the Indians. This trouble and the military engagements between the Government and certain bands of the Indians from 1873 to 1877, inclusive, had no direct connection with the Black Hills matter.

In the act of August 15, 1876, making appropriations for the Indian Department for the year ending June 30, 1877, Congress, with full knowledge of the existing conditions, made a further appropriation of $1,000,000 for the subsistence and civilization of the Sioux Indians and provided therein that no part of that appropriation could be used, and that, thereafter, no appropriation for that purpose would be made, unless the Indians should relinquish all right and claim to hunt and roam on any country outside of the boundary of the permanent reservation and release to the Government so much of their permanent reservation as lay west of the 103rd meridian of longitude, which was the Black Hills area, and should also grant rights-of-way over the reservation to the country thus ceded for wagon or other roads from convenient and accessible points on the Missouri River. This act also appropriated an additional

amount of $200,000 to be expended by the President in carrying out those provisions. The President promptly appointed a commission to negotiate with the Sioux Tribe for the relinquishments, cessions, and stipulations required by the act. This commission proceeded to the Sioux country and negotiated and counseled with the chiefs, headmen, and the Indians at the various agencies within the reservation for their assent to an agreement of sale to the Government embodying the terms and conditions of the act of Congress, both of which were duly explained and interpreted to the Indians, and every effort was made to secure, in conformity with article 12 of the treaty of 1868, the assent and signatures of three-fourths of the male adult Indians of the tribe to the agreement. In this the commission was unsuccessful. The male adults constituted about 25 percent of the entire population of the tribe. As shown in the findings, more than 90 percent of the male adult Indians of the tribe refused to agree to sell the Black Hills and the hunting rights to the Government at any price; a small portion of the Indians expressed a willingness to lease only the mining rights in the Black Hills to the Government for $70,000,000 or subsistence for all members of the tribe so long as the tribe existed. Finally, the commission was able to obtain the assent and signature to the agreement of less than 10 percent of the male adult members of the tribe. The record of the negotiations between the commission and the Indians, which was laid before the President and the Congress, shows that anything more than what the commission accomplished was impossible through negotiations. The chiefs and headmen of the tribe assented to the terms of the act of 1876 and the provisions of the agreement which embodied them. The agreement, to the extent consummated by the commission, was transmitted by the commission to the President with the journal and minutes of the commission, and they were, in turn, transmitted to Congress by the President for action. In due course the Congress embodied the agreement, so transmitted, in an act of both Houses, which act contained, among others, the requirements of the act of August 15, 1876. This action was taken pursuant to the provisions of section 4 of the act of 1871, 16 Stat. 566, R. S. 2079—*Lone Wolf* v. *Hitch-*

cock, 187 U. S. 553, 556; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27. It was approved by the President on February 28, 1877 (19 Stat. 254). The provisions of this act of 1877 have been in every respect fulfilled by the Government. Article 5 of the "Agreement" made the act of Congress provided that "Such rations [for subsistence of the Indians of the Sioux Tribe], or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves."

In addition to the total of $3,055,450 appropriated and disbursed for subsistence of the Indians for the fiscal years 1874 to 1876, the Government, under and pursuant to the provisions of the act of February 28, 1877, has appropriated and disbursed for the subsistence of the Sioux Indians a total of more than $39,000,000 to June 30, 1926. Additional appropriations subsequently made for the same purpose have brought the total to approximately $43,000,000—(finding 19). In addition to these appropriations, the act of 1877 gave the Indians about 900,000 additional acres of grazing lands.

Subsequently, by the act of March 2, 1889, Congress directed that the Great Sioux Reservation, as it then existed, be divided into separate reservations of stated metes and bounds and that the land within the reservation outside the limits of the delimited permanent reservation should be sold for the benefit of the Indians in the manner provided in that act. Section 19 of this act also provided that all the provisions of the treaty of 1868 and the agreement signed by certain of the Indians in September 1876 not in conflict with the act should be continued in force according to their tenor and limitation. By section 28 thereof it was provided that the act should become effective only upon acceptance by the Indians as provided in article 12 of the treaty of 1868, that is, by not less than three-fourths of the male adult Indians. The act was submitted to and duly accepted by the Indians and such acceptance was proclaimed by the President. See *Choctaw Nation* v. *United States*, *supra*, page 29.

Sections 1 and 2 of the jurisdictional act, 41 Stat. 738, under which this suit was instituted, and within the terms

of which the claim presented must be decided, are as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.
>
> SEC. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; * * *.

At the outset it should be stated that the jurisdiction of the court must be found within the terms of the jurisdictional act. *Tillson* v. *United States*, 100 U. S. 43; *United States* v. *Choctaw Nation and Chickasaw Nation*, 179 U. S. 494, 534, 535. The act merely provides a forum for the adjudication of the claim according to applicable legal principles. In *Price* v. *United States and Osage Indians*, 174 U. S. 373, 375, the court said:

> The right of the plaintiff to recover is a purely statutory right. The jurisdiction of the Court of

> Claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed by the Government, or the Indian tribe, whose members were guilty of this depredation, we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume. It is useless to cite all the authorities, for they are many, upon the proposition. It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it. See, among other cases, *Schillinger* v. *United States*, 155 U. S. 163, 166, in which this court said: "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government."

In *United States* v. *Mille Lac Band of Chippewa Indians in the State of Minnesota*, 229 U. S. 498, 500, the court said:

> The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians.

Suit may not be maintained against the United States in any case on a claim not clearly within the terms of the statute by which it consents to be sued. *United States* v. *Michel*, 282 U. S. 556, 659. Special jurisdictional acts are strictly construed and clear grant of authority must be found in the act. *Blackfeather* v. *United States*, 190 U. S. 368, 373–376. *United States* v. *Goltra*, 312 U. S. 203, 210, 211; *United States* v. *Shaw*, 309 U. S. 495, 500, 501. Only where consent "to suit" *without qualification* has been given

in respect of suits against Government owned or controlled corporations has the act granting the consent been liberally construed—*Keifer & Keifer* v. *Reconstruction Finance Co., et al.*, 306 U. S. 381, 387, 396. "If Congress has been accustomed [in the enactment of special jurisdictional acts] to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute. But * * * the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops." *Boston Sand and Gravel Company* v. *United States*, 278 U. S. 41, 48. The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown. The court may not enlarge its liability beyond what the language of the act requires. *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 686; *Blair* v. *City of Chicago*, 201 U. S. 401, 470–473; *Bridge Company* v. *United States*, 105 U. S. 470, 480–484. When Congress has desired to open up claims, as a result of its action taken pursuant to a policy deemed to be for the welfare of the Indians, for consideration and adjudication *de novo* it has used language clearly indicating that purpose. *Choctaw Nation* v. *United States*, 119 U. S. 1, 2, 36–31, 35. *Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347, 348–350. While, in proper cases, the rules of law which apply to the Government are, with a few exceptions growing out of public policy, the same as those which apply to individuals, public policy demands that the Government in its dealings with individuals should occupy an apparently favored position and consequently the equities which arise as between individuals have, in the absence of waiver by Congress, but a limited application as between the Government and a citizen. *United States* v. *Verdier*, 164 U. S. 213, 218, 219.

The reason for the rule of strict construction as announced in the above-cited cases is that "it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." *Slidell* v. *Grandjean*, 111 U. S. 412, 438.

In the case at bar the jurisdictional act, except so far as concerned the competency of the Indian tribe to sue and the limitation on our general jurisdiction under section 259, title 28, U. S. C., as well as the statute of limitation, created no new right or claim in favor of the tribe not otherwise within the limitations of our general jurisdiction. *Green* v. *Menominee Tribe*, 233 U. S. 558, 570, 571. *Whitney* v. *Robertson*, 124 U. S. 190, 194, 195. It is a warrant of authority to adjudicate legal results, and not to determine the propriety or reasonableness of the means employed by Congress unless it appears that the action taken by the means adopted violated substantive rights of the Indians and that liability of the Government for a money judgment was a legal incident of the action taken by Congress. Compare *Mille Lac Chippewas* v. *United States*, 46 C. Cls. 424, 455.

A study of the facts and circumstances of this case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, and the application thereof to the provisions of the jurisdictional act in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in their dealings with each other leads us to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a "taking" or "for the misappropriation of any lands of said tribe."

Except for the fact that in this case Congress passed a special jurisdictional act providing a forum to which the tribe might present for adjudication any legal or equitable claim which it might have against the United States under and legally supported by any treaty, agreement, or law of Congress, the case at bar is almost identical on its facts and the treaty and statutory provisions with the case of *Lone Wolf* v. *Hitchcock*, 187 U. S. 553. In that case, as here, the Government was unable to obtain the consent of three-fourths of the male adult Indians of the tribe to an agreement which the Congress, over the protest of the Indians and with the knowledge that it had not been assented to by the required three-fourths, embodied in an act of Congress notwithstanding the provisions of article 12 of the

treaty. The acts in both cases were subsequently carried out by the Government.

In the case at bar the claim made by plaintiff for compensation as for a taking of its land and hunting rights is fundamentally predicated upon the provisions of articles 2 and 12 of the treaty of 1868. This claim is attempted to be sustained on the sole ground that the action of Congress, with the approval of the President, in requiring the tribe to give up a portion of its reservation and hunting rights to the Government was not in conformity with the provisions of article 12 of the treaty of 1868 with reference to the consent of three-fourths of the tribe to a cession. This is necessarily the sole ground upon which the claim could be made because there was no law of Congress relating to this claim granting plaintiff any rights which have not been faithfully fulfilled. The act of 1877 is not a law supporting the claim because everything that act promised has been given, and also because that statute was the act of the Government which gave rise to a claim of plaintiff, if it has one, under the treaty of 1868.

In the *Shoshone* and *Creek* cases, *supra*, cited and relied on by plaintiff, there was, on the facts disclosed, an arbitrary taking by the Government without payment or the assumption of an obligation to pay any compensation, and it was held that the lands of the Indians had been taken for a public purpose and under such circumstances as to give rise to an implied obligation under the Fifth Amendment to pay just compensation therefor. In the case at bar, the Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the Indians of the Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and hunting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay. There is, therefore, no room for the conclusion that under the act of 1877 Congress impliedly

promised to pay more than what was specified therein. *Baker* v. *Harvey*, 181 U. S. 481, 492; *Blackfeather* v. *United States*, 190 U. S. 368, 373.

In other cases hereinafter mentioned the Indians were required against their will and consent to relinquish to the Government portions of their reservations for sale or disposition for their benefit, and these acts were sustained as being clearly within the authority of Congress to legislate with reference to control and disposition of Indian property.

As we shall hereinafter attempt to show, we think there is no difference in principle insofar as any legal claim of the plaintiff is concerned between the power or authority of Congress to do what it did in this case and our authority to pass upon the justness and fairness of what it did, and what was done in other cases without the consent of the Indians and contrary to the provisions of treaty stipulations. In other words, if in the case at bar Congress had the authority legally to do what it did, and if the action taken and the results of that action were pursuant to and based upon what Congress deemed in the circumstances to be for the interest of the Indians, as the facts clearly show was the case, the Indians have no *legal right* to complain, or to maintain under the terms of the jurisdictional act a claim for more money, plus the addition of interest from 1877, in addition to the amount which Congress stipulated should be paid and which has been and is being paid, and will continue to be paid until the Indians, with the assistance of the Government, become self-supporting. Congress possessed the authority to take the action of which the plaintiff complains, and since the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties there was no misappropriation of the land by the Government and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of this legislation or the wisdom thereof.

There was inherent in the treaty of 1868, as one of the necessarily implied conditions thereof, the undeniable right of Congress, if it deemed the interests of the Indians as well as those of the Government and the existing circumstances

dictated or required, to legislate under the act of 1871 in whatever way it might choose with reference to the management and control of the property and affairs of the Indians, even though such action should be in conflict with some treaty provision and against the desire of the Indians. "The power of the general government over these remnants of a race once powerful, * * * is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." *United States* v. *Kagama*, 118 U. S. 375, 383. *Lone Wolf* v. *Hitchcock*, supra, p. 567. This was expressly recognized and stated by the court in *Choate* v. *Trapp*, 224 U. S. 665, in which, at pp. 670 and 671, the court said:

There are many cases, some of which are cited in the opinion of the Supreme Court of Oklahoma (*Thomas* v. *Gay*, 169 U. S. 264, 271; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565), recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States.

This sovereign and plenary power was exercised and retained in all the dealings and legislation under which the lands of the Choctaws and Chickasaws were divided in severalty among the members of the Tribes. For, although the Atoka Agreement is in the form of a contract it is still an integral part of the Curtis Act, and, if not a treaty, is a public law relating to tribal property, and as such was amendable and repealable at the will of Congress. But there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. *Reichert* v. *Felps*, 6 Wall. 160. The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka Agreement, but whether they had not acquired rights under the Curtis Act which are now protected by the Constitution of the United States.

In essence, therefore, the present claim is moral, rather than legal, and before we can adjudicate and render judgment upon it, we must have from Congress clear authority to do so, which authority, we think, under the rule announced in the *Price* and *Osage* cases, and other cases cited, *supra*, was not conferred by the jurisdictional act. We must presume in the circumstances of this case that Congress acted in good faith.

An inherent weakness in plaintiff's position and argument is the assumption that in every case and under every circumstance, insofar as the right of the Government to require or compel the Indians to dispose of their property is concerned, the Indians and the Government stand on an equality with respect to the authority of either to act without incurring legal liability when a treaty exists.

The case of *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, involved a treaty of 1867 with the Kiowa and Comanche Tribes of Indians which set apart a reservation of land for their absolute use and occupation with a stipulation that no treaty for the cession of any portion or part of the reservation "shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same." An act of Congress of June 6, 1900, embodied a so-called agreement for cession of certain land to the Government for allotment in severalty to which the Government had been unable to obtain the assent of the required three-fourths of the male adult Indians of the tribe. To that extent the "agreement" and the act of Congress were in conflict with article 12 of the treaty. When the proposed agreement was submitted to the Indians by the commission appointed for that purpose, they objected to the same and refused to assent to it, and only a portion, less than three-fourths, signed it. When it was submitted to Congress the Indian Tribe protested against it to Congress, insisting that they had not consented to it as required by the treaty and that it was in conflict with the express provisions of the treaty. Notwithstanding this, the instrument was made the terms of an act of Congress pursuant to a policy deemed by Congress to be for the benefit of and in

the interest of the Indians and the Government. Lone Wolf, who was joined by the members of the tribes, brought a suit in equity to enjoin the Secretary of Interior from carrying out the provisions of the act on the ground, among others, that it violated the property rights of the Indians under their treaty.

While it is true, in that case, the cession to the Government enforced by the act of 1900 was the surrender of lands for allotment to the Indians in severalty rather than a forced sale to or acquisition by the Government, as in the case at bar, nevertheless the court considered and announced certain principles with reference to the authority of Congress from considerations of necessity or policy to legislate contrary to treaty stipulations and with reference to the extent to which the court might inquire into the wisdom of the policy as being in the interest of the Indians. The court held, at p. 564, that "To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained." And, at p. 564 and 565, the court said: "Now, it is true that in decisions of this court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands. *Johnson* v. *McIntosh*, (1823) 8 Wheat. 543, 574; *Cherokee Nation* v. *Georgia*, (1831) 5 Pet. 1, 48; *Worcester* v. *Georgia*, (1832) 6 Pet. 515, 581; *United States* v. *Cook*, (1873) 19 Wall. 591, 592; *Leavenworth &c R. R. Co.* v. *United States*, (1875) 92 U. S. 733, 755; *Beecher* v. *Wetherby*, (1877) 95 U. S. 517, 525. But in none of these cases was there involved a controversy between Indians and the Government respecting the power of Congress to administer the property of the Indians. *The questions considered in the cases referred to, which either directly or indirectly had relation to the nature of the property rights of the Indians,*

concerned the character and extent of such rights as respected States or individuals. In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians. Thus, in *Beecher* v. *Wetherby*, 95 U. S. 517, discussing the claim that there had been a prior reservation of land by treaty to the use of a certain tribe of Indians, the court said (p. 525): 'But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.'" The court, at page 565, further stated that "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government. Until the year 1871 [act of March 3, 1871, 16 Stat. 544] the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, *Chinese Exclusion Case*, 130 U. S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians." And the court said further, at page 566, that "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be

exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians."

And, finally, at p. 568, the court said:

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.

We think the principles thus announced by the court in the *Lone Wolf case* are applicable here under the facts and circumstances in this case and that the decisions in *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 304 U. S. 111, upon which plaintiff relies, and other similar cases hereinafter discussed, are distinguishable for the reason that in those cases Congress exercised an arbitrary power, either directly or by ratification, which deprived the Indians of their property without rendering, or assuming an obligation to render, compensation therefor. The claims involved in the *Creek* and *Shoshone* cases were clearly and unquestionably *legal* claims. Compare *Chippewa Indians of Minnesota* v. *United States*, 91 C. Cls. 97.

Subsequent to the opinion in the *Lone Wolf case*, a number of cases have been decided in which the principles announced in that case have been recognized and which announce the additional principle, which has now become well-established in cases brought under special jurisdictional acts, that the United State cannot, through Congress or

otherwise, arbitrarily deprive the Indians of their lands or monies secured to them by a treaty or law of Congress, or to appropriate the lands of Indian tribes to its own purposes or give them to others without rendering or assuming an obligation to render just compensation therefor. In *United States* v. *Creek Nation*, 295 U. S. 103, the tribe brought suit in this court under a jurisdictional act to recover compensation for certain lands of its reservation of which it had been deprived, without its consent, and for which it had not been paid. The court, at page 108, said:

> Counsel for the government, assuming that the present claim is merely for damages arising out of errors on the part of administrative officers, contend that it does not come within the terms of the jurisdictional act—"any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States." We think the contention is not tenable.
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> Counsel's assumption ignores several elements of the claim, such as the treaties of 1833 and 1866 and the acts of Congress of 1889 and 1891. It also neglects matters reflecting a confirmation of the acts of the administrative officers, such as the receipt by the United States of direct and material benefits from their acts and its retention of the benefits with knowledge of all the facts.
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> While the jurisdictional act is couched in general terms, there can be little doubt when it is read in the light of the circumstances leading to its passage that it is intended to include the present claim. The congressional committees on whose recommendation the act was passed were in possession of all data bearing on the claim. The facts had been laid before them in letters from the Secretary of the Interior, the Commissioner of Indian Affairs and the Commissioner of the General Land Office. * * * In view of this portrayal of the matter by the officers specially charged with the administration of Indian and public-land affairs, and the subsequent action of the committees in effecting the passage of the jurisdictional act, we regard it as reasonably manifest that the act is intended to provide for the adjudication of the present claim. The conces-

sions made in the court below by those who were there representing the Government show rather plainly that they so understood the act.

The court, in discussing the question whether there had been a taking and the liability of the United States in connection therewith under the facts disclosed, at pages 109-111, said:

> A question is raised as to whether there was an appropriation or taking of the lands by the United States.
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> The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. *The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe*, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation." *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307-308.
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> Such was the situation when the lands in question were disposed of under the act of 1891. The disposals were made on behalf of the United States by officers to whom it had committed the administration of that act, and were consummated by the issue of patents signed by the President. [Italics ours.]
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> * * * * *
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> We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe.

The case of *Klamath and Moadoc Tribes of Indians et al.* v. *United States*, 296 U. S. 244, involved a question of law as to the right of the Indians to recover because they had executed a release in connection with a payment which the

Government had made for certain land, of which they had originally been deprived without their consent under an act of Congress in 1906, but the opinion of the court, in certain aspects, is pertinent here. In that case the Indians claimed that they were entitled to maintain suit to recover just compensation for 87,000 acres of land on the ground (1) that they had been deprived of this land contrary to the provisions of a treaty and without their knowledge or consent (which was true); (2) that it was a legal and equitable claim within the meaning of the language of section 1 of the jurisdictional act; (3) that the consideration of $108,750 paid by the government therefor, pursuant to an act of Congress of 1908, was wholly inadequate (which was true); and (4) that they were not barred because of a release from recovering just compensation for the land by reason of a provision in section 2 of the jurisdictional act, which provided that any payment which had been made on any claim submitted to the court should not be pleaded as an estoppel but might be pleaded as an offset. This court had found that the fair value of the 87,000 acres of land, when taken in 1906, was $2,980,000. Interpreting section 1 of the jurisdictional act, the Supreme Court (p. 250) said:

> The meaning of the general language of section 1 that "all claims of whatsoever nature" which plaintiffs have against the United States "may be submitted" is limited by the clause "which have not heretofore been determined by the Court of Claims," and is further much narrowed by the definitions of the classes of claims meant to be included. And correspondingly restrained is the meaning of the phrase "all legal and equitable claims" in the clause conferring jurisdiction upon the court "to hear and determine." Thus the privilege of plaintiffs to submit and the power of the court to determine are made coextensive. The Act grants a special privilege to plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms. *Schillinger* v. *United States*, 155 U. S. 163, 166. *Price* v. *United States and Osage Indians*, 174 U. S. 373, 375. *Blackfeather* v. *United States*, 190 U. S. 368, 376.
>
> This claim is plainly not, within the meaning of section 1, for an amount due under treaty, agreement or law of Congress or for misappropriation of funds of the Indians. * * *.

The court further said, at pp. 251, 252:

> Plaintiffs turn for support to the provision of section 2 which prevents "payment * * * upon any claim" from being pleaded as an estoppel but permits it to be asserted as an offset. And they insist that, if this clause does not relate to payments made and accepted as being in full, it means nothing. But that contention is based on a misunderstanding of the language used. Payment upon a claim means payment on account or in part as distinguished from one made and accepted as payment in full. The quoted provision made no grant of jurisdiction; it was inserted merely to eliminate defenses. Neither it nor any other part of section 2 may be held to add claims to those covered by the language of section 1. As jurisdiction will not be extended beyond the terms of the Act by any implication or other resort to construction, no force can be given to plaintiffs' suggestion that intention to include claims already settled and released is shown by the clause in section 2 allowing defendant credit for money it expended for plaintiffs.

In connection with the question whether the tribes had shown the release invalid, the court, at p. 252, said:

> The question is not whether under the circumstances disclosed the United States may set up the release as a defense. It is whether the special Act brings the claim within the court's jurisdiction. * * * It is to be remembered that the Act of April 30, 1908, was passed by Congress in the exertion of its untrammeled power in behalf of the United States to fix, as it deems appropriate and just under the circumstances, the amount of compensation to be paid the Indians for the rights of the plaintiffs lost by the taking of the 87,000 acres from their reservation. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 306, 308. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565–566. *Choate* v. *Trapp*, 224 U. S. 665, 670–671. Cf. *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 506, 509–510. *United States* v. *Creek Nation*, *supra*, 110.

Finally, with reference to the inadequacy of the amount paid by the government for the lands which had been taken and the relationship between the Government and the Indians, the court, at p. 254, said:

> Plaintiffs say that the plain inadequacy of the payment, when taken in connection with the unequal posi-

tions of the parties, is enough without more to invalidate the release. The findings show that the amount paid plaintiffs was less than four percent of the value of the land. It was grossly inadequate. Where, in litigation between private parties, a release of claim is by the party who gave it challenged as invalid, inadequacy of consideration coupled with lack of business capacity and inferiority of position in respect of the transaction or in relation to that of the other party are elements having significance. *Wheeler* v. *Smith*, 9 How. 55, 82. *Thorn Wire Co.* v. *Washburn & Moen Co.*, 159 U. S. 423, 443. But the rules that govern in such cases have no application in suits by these Indian tribes against the United States. The relation between them is different from that existing between individuals whether dealing at arm's length, as trustees and beneficiaries, or otherwise. See *Choctaw Nation* v. *United States*, 119 U. S. 1, 28. *Lone Wolf* v. *Hitchcock*, *ubi, supra*. *Choate* v. *Trapp*, *ubi, supra*. Regard being had to the nature of duties, resembling those arising out of the relation of guardian and ward, owed by the United States to Indian tribes, and in view of the undoubted power of Congress to determine the amount and to fix the terms of payment of compensation for the rights lost to plaintiffs, it is clear that in the absence of specific authorization, they may not avoid the release given in accordance with the Act upon the ground that the payment was too small. That would enable them to question the laws of Congress in fields where because of the relationship referred to, they are supreme.

The obligation of the United States to make good plaintiffs' loss is a moral one calling for action by Congress in accordance with what it shall determine to be right. Save to the extent that Congress may authorize, the Government's dealings with Indian tribes are not subject to judicial review. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 567–568.

Subsequently, in 1936, Congress passed an additional jurisdictional act in the *Klamath* case authorizing the court to enter judgment upon the findings of fact theretofore made with the provision that any payment theretofore made to the Indians in connection with any release of settlement should be charged as an offset but should not be treated as an estoppel, and this court entered judgment on the basis of a value of $2,980,000, less the payment made and other

allowable offsets, which judgment, with the addition of interest from 1906, as a part of just compensation, amounted to $5,313,347.32. 85 C. Cls. 451; affirmed 304 U. S. 119.

The case of *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, and *United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111, on which plaintiff places chief reliance in support of its claim, was a case where the Government officials in 1878 arbitrarily took certain lands or rights therein of the Shoshone Indians for the benefit of another tribe without the consent, then or later, of the Shoshone Indians and, therefore, contrary to and in violation of the provisions of articles 2 and 12 of the treaty, and this action was subsequently ratified by Congress by an act ratifying an agreement of cession in connection with which the Shoshones were required to permit the Arapahoes to participate, and in the proceeds of which the Arapahoes were to share equally. In that case there was no acquisition of land by the Government from the Indians for a consideration deemed adequate, nor was there an acquisition in connection with or in pursuance of a policy or the exercise of a power deemed by Congress to be for the interest or welfare of the Indians, as well as the Government. In that case the Government did not undertake to render, or assume an obligation (except under the Fifth Amendment) to render compensation for the land of which the Shoshone Indians were deprived, or the money from the reservation of which they would be deprived by reason of the action taken. The land was therefore taken or misappropriated under the treaty and the Shoshone Indians had a legal claim for compensation therefor. In the first decision, 299 U. S. 476, 496, 497, the court held that there had been a taking of property of the Shoshone Tribe under the power of eminent domain and that "The fact is unimportant that the taking was tortious in its origin, if it was made lawful by relation" (*United States* v. *Goltra et al.*, 312 U. S. 203, 208, 209), and "The fact also is unimportant that it was a partial taking only, and that eviction was not complete", and that "Finally the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that

the jurisdictional act is silent as to an award of interest or any substitute therefor. * * * Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages." Finally the court, recognizing the rule of the undoubted authority of Congress, which cannot be questioned in a legal proceeding, to deal with tribal property of the Indians in whatever way it deems to be for the best interests and welfare of the Indians, as well as of the Government, said:

> Nor does the nature of the right divested avail to modify the rule. Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564, 565, 566. The power does not extend so far as to enable the Government "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation * * *; for that 'would not be an exercise of guardianship, but an act of confiscation.'" *United States* v. *Creek Nation*, *supra*, [295 U. S. 103] p. 110; citing *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307–308. The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is "as sacred as that of the United States to the fee." *United States* v. *Cook*, *supra*, p. 593; *Lone Wolf* v. *Hitchcock*, *supra; Choate* v. *Trapp*, 224 U. S. 665, 671; *Yankton Sioux Tribe* v. *United States*, *supra*. Spoliation is not management.

In the case of *Chippewa Indians of Minnesota* v. *United States*, 88 C. Cls. 1, the Indians sued to recover interest on a trust fund, which fund and interest was provided for under an agreement between the Indians and the Government, but which fund was, before the expiration of the period stipulated in the agreement, expended and disbursed by direction of an act of Congress contrary to the provisions of the agreement that such fund would be held in trust at interest for fifty years. This court dismissed the claim on the ground that Congress possessed the authority to do what it had done without rendering the Government liable

for continued payment of interest under the prior agreement, and that the Indians had no legal claim against the Government for the interest on the trust fund which they, otherwise, would have received. See 307 U. S. 1.

In the case at bar the United States, acting through the Congress in the exercise of authority which it clearly possessed to legislate for what it deemed to be for the best interest of the Indians, did not "misappropriate" plaintiff's land, nor did it "take" the land from the Indians and give it to another without compensation. The Government endeavored in every way possible during 1875 and 1876 to arrive at a mutual agreement with the Indians for the sale by the Indians of a portion of their reservation to the Government in conformity with article 12 of the treaty of 1868. The Indians refused to sell. Thereupon the Congress, by the act of February 28, 1877, in effect, required the Indians to sell certain hunting rights and the Black Hills area of their reservation to the Government in return for a consideration of 900,000 acres of additional land and approximately one million dollars a year until such time as the Indians should become self-supporting, which consideration the Government, otherwise, was under no legal obligation to give. The exercise of this authority and the legality of it, insofar as the legal right of the Indians to question it is concerned, are, we think, no different in principle from the case where the Congress legislates for the cession, sale, or disposition of tribal property for benefit of the Indians in pursuance of a policy deemed to be in the interest of the Indians, as well as the Government, without the consent of the Indians and in conflict with some provision of a treaty or agreement, or a prior law of Congress. The mere fact that the Government, in the case at bar, acquired the property outright, instead of in trust, for sale or disposition for the benefit of the Indians does not affect the legal principle which controls, and does not bring the claim for more money within the terms of the jurisdictional act.

Plaintiff's position in substance is that one party to a proposed transaction cannot legally fix the terms or consideration and force the other party to accept them. This

is true in transactions between private parties dealing at arm's length and on terms of equal authority, but this legal proposition does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom, or authority of Congress, unless Congress has clearly granted to the Indians the right to do so. In our opinion this has not been done for "the [jurisdictional] act grants a special privilege to the plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms"—*Klamath and Modoc Tribes of Indians et al.* v. *United States*, 296 U. S. 244, 250; *Price* v. *United States*, 174 U. S. 373, 375; *United States* v. *Mille Lac Indians*, 229 U. S. 498. To hold otherwise, it would be necessary for us to go back of the acts of August 15, 1876, and February 28, 1877, and inquire into the policy as well as the judgment and wisdom of Congress which prompted it to act as it did and, therefore, adjudicate and render judgment either for or against the Indians on a moral claim. We cannot find that authority in the jurisdictional act. The provision in the first sentence of section 2 of the jurisdictional act that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset" is not a grant of jurisdiction (*Klamath Tribe* v. *United States*, *supra*), and therefore applies only to any payment which may have been made on any legal claim which comes within the scope of the terms of section 1 of the act.

The facts and circumstances of this case show that in 1876 and in 1877 the Congress, being confronted with a situation where there was perhaps a moral obligation, but no legal liability, to provide subsistence for the Indians for a long time to come, and the Government not being in the position at that time to develop for the Indians any portion of their reservation so that the Indians might provide for their own subsistence, considered and decided that it was in the interest of all concerned that the Indians should give something to the Government which it wanted and needed in connection with the carrying out of a governmental policy in return for the expenditure for the benefit

of the Indians of large sums of public funds. It was then expending without obligation more than $1,000,000 a year. In these circumstances, and for the reasons hereinbefore stated, we are of opinion that plaintiff has no legal claim within the meaning of the jurisdictional act which is supported by any treaty, agreement, or law of Congress upon which this court is authorized to render a money judgment.

In reaching this conclusion we have kept in mind the principle of law that while the government always has the right to take or appropriate any private property for a public use, if it does so, without claim of title and without compensation, there arises an implied contract under the Fifth Amendment, and, therefore, a legal claim for just compensation. *United States* v. *Buffalo Pitts Company*, 234 U. S. 228, 234, 235. And we have also kept in mind the well-established principle that the ascertainment of just compensation for a taking or condemnation of property under the Fifth Amendment, or what constitutes just compensation thereunder, is a judicial function and that "It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation," *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 324, 327; *Seaboard Air Line Railway Company et al.* v. *United States*, 261 U. S. 299, 304. In these cases Congress authorized the taking of property and authorized suit for recovery from the Government of just compensation therefor. But before this general rule is applicable to Indian cases, consideration must be given to the question of policy and the extent of the plenary authority of Congress to legislate in such a way as it deems proper with reference to the management and control of the property and affairs of the Indian tribes and the extent to which consent to be sued has been granted, as well as to the circumstances and conditions under which an implied contract will arise under the Fifth Amendment. The facts must show not only that there has been a "taking" or "misappropriation" by the Government of land or property of the tribe under such circumstances as will give rise to an

implication of a promise or undertaking to make "just compensation" (*United States* v. *Creek Nation*, 295 U. S. 103, 111), but that Congress has, by the jurisdictional act, which speaks only of legal claims, opened up the question of the fairness of what was done or of the adequacy of the consideration paid, and has authorized the court to determine, adjudicate, and render judgment accordingly. *Klamath Indians* v. *United States*, *supra; Choctaw Nation* v. *United States*, *supra*.

In the *Monongahela Case*, *supra*, Congress had authorized and directed the Secretary of War to negotiate for and purchase, if possible, certain properties of the Navigation Company and in the event of his inability to make a voluntary purchase of the lock and dam and its appurtenances for the sum authorized, the Secretary was authorized and directed to institute and carry to completion proceedings for the condemnation of the lock and dam and its appurtenances in the Circuit Court of the United States for the Western District of Pennsylvania, with the proviso that in estimating the sum to be paid by the United States, in such condemnation proceedings, the franchise of the corporation to collect tolls should not be considered or estimated. The court held that by this legislation Congress had "assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial."

In the *Seaboard Air Line Case*, *supra*, Congress by section 10 of the Lever Act of May 23, 1919, authorized the President to take private property or other supplies necessary to the support and maintenance of the Army and Navy, or for any public use connected with common defense, and directed that the President "shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the

amount so determined by the President, and shall be entitled to sue the United States to recover such further sum, as, added to seventy-five per centum, will make up such amount as will be just compensation for such" property, and conferred jurisdiction upon the District Courts to hear and determine all such controversies. The question in that case was whether there should be added to the value of the property at the time it was taken an additional amount, measured by interest, in order to make the principal amount allowed just compensation contemporaneously with the taking.

The jurisdictional act confers no equitable jurisdiction such as would be applicable to the claim here presented. Compare *Choctaw Nation* v. *United States*, 119 U. S. 1, 2, 28, 29; *Winton* v. *Amos*, 255 U. S. 373, and *Seminole Nation* v. *United States*, 316 U. S. 286 (No. 348), decided May 11, 1942. While in a proper case the court may adjudicate a claim on equitable principles relating to fraudulent acts of those charged with the duty of administering the property and affairs of the Indians under treaties and acts of Congress—*Seminole Nation* v. *United States*, *supra; Ross* v. *Stewart*, 227 U. S. 530; *United States* v. *Wildcat*, 244 U. S. 111; *Campbell* v. *Wadsworth*, 248 U. S. 169—no fraud is alleged in this case and there is no basis for such an allegation with respect to the action of Congress in August 1876 and February 1877. In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the acts of Congress and inquire into any moral obligation of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender. *Lone Wolf* v. *Hitchcock*, *supra*. This phase of the claim clearly was not considered by Congress when the jurisdictional act was enacted and we cannot consider and adjudicate it unless and until Congress has unmistakably indicated its intention that we should do so. The report of the Committee on Indian Affairs of the House of Representatives (*No. 77, 66th Cong., 1st sess.*) shows very clearly, we think, that the extent and purpose of the jurisdictional act

was merely to provide a forum for the adjudication of legal claims. In this connection, the report states as follows:

> Thus, notwithstanding the fact that the United States had by solemn treaty entered into in 1868 agreed to preserve inviolate the permanent reservation of the Sioux, in 1876 the above proviso in the Indian appropriation bill of that year plainly told the Indians that no more subsistence would be furnished them until they ceded a portion of their lands and certain rights of way over the remaining lands. Thus it is very easy to understand why the Indians consented to the agreement of September 26, 1876 (ratified Feb. 28, 1877), whereby they ceded the Black Hills country and gave consent to three road rights of way from the Missouri River to the Black Hills.
>
> The Sioux Indians have for years urged their claim that the agreement of cession of 1876 was made under duress and carried no valuable consideration for the lands ceded; that the things which the Government agreed to do [in the acts of 1876 and 1877] it had already agreed to in the treaty of 1868.
>
> Your committee, after carefully considering the matter, is of the opinion that to the end that the most amicable relations between the Government and the Sioux Indians should be promoted and that right and justice should be done, these Indian tribes should have the right to [have] their claims presented to and adjudicated by the Court of Claims.
>
> What This Bill Provides
>
> The salient features of the bill provide that all claims of the Indians, both legal and equitable, be submitted to the Court of Claims for adjudication, the Government having the right to set off as against any judgment which may be found any set-offs or counterclaims which the Government may have against the Indians, including gratuities heretofore granted to them by Congress.
>
> It further provides the measure of damages and that *the judgment of the Court of Claims for damages for misappropriating the lands of the Indians, if any be found, shall divest all claim and title of the Indians to the land upon satisfaction of the judgment.*
>
> * * * * *

> Section three proceeds on the theory that the proper measure of damages for the alleged wrongs is the value of the land at the time of the appropriation plus a reasonable interest charge as damages for detention of the amount owed from the date of the appropriation to date of decree. It appears that the Indians are not seeking a recovery of the land itself, but simply a sum as damages for their ouster and the appropriation of it by the Government. In this situation the cause of action or of complaint arose as soon as the ouster or dispossession or disseizing occurred. In short, the Indians chose and now choose to treat themselves as disseized, as having relinquished the land to the Government at the time of its appropriation, and their complaint, in substance, is that they have never received the money therefor. They were entitled to the money as soon as the disseizin occurred, and hence the thing due was this sum of money then due which, necessarily, was the then value of the land. Since they have been deprived of this money for these years, another element of damage necessary to make them whole would be the value of the use of the money to them had they received it at the time of the appropriation by the Government. This, of course, would be, to compute it in terms of money, a reasonable interest on this sum. The committee believes that 3 percent per annum is fair and equitable.

Section 3, last above mentioned by the House Committee, was not enacted. Section 3 of the bill as it had passed the House was eliminated by the Senate. The report of the committee of conference (House Report No. 1024, May 22, 1920, 66th Cong., 2d sess.) on the bill as it was finally enacted stated as follows:

> The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H. R. 400) authorizing the Sioux Tribe of Indians to submit to the Court of Claims having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:
>
> That the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment as follows:
>
> After the word "funds," in section 1, insert the words *or lands*, and before the comma in the same line insert

the words *or band or bands thereof*; and the Senate agree to the same.

* * * * *

This bill H. R. 400 authorizes the Sioux Tribe of Indians to submit claims to the Court of Claims. The Senate amended by substitution, which presented to your managers three points of difference between the two bills and which are hereafter discussed in the order in which they appear.

In section 2 of the bill as passed by the House, in defining the jurisdiction of the Court of Claims and in providing what may be pleaded as a credit or set-off on the part of the United States, there appear the two words, "including gratuities." The effect of these two words appears immaterial when it is noted that the fore part of section 2 provides "that if any claim or claims be submitted to said courts they shall settle the rights thereof, both legal and equitable, of each and all of the parties thereto * * *."

The fore part of section 3 as passed by the House provides that if it be found any lands have been wrongfully appropriated the damages shall be confined to the value of the land at the time of said appropriation. That was not carried in the Senate bill, inasmuch as the provision therein contained is the rule of all courts with relation to the misappropriation of land or other property. Hence it appears that this difference in the two bills is also immaterial.

The latter part of section 3 as passed by the House provided, if judgment should be recovered, interest should be decreed thereon at the rate of 3 per cent per annum from the date of the appropriation of the lands. It has not been the practice of Congress in passing Court of Claims bills to authorize the payment of interest, and the conferees finally agreed that it is perhaps not wise to establish a precedent along that line.

Inasmuch as section 3 of the House bill, which was not carried in the Senate bill, contains the only direct reference in the bill to a claim for damages on account of misappropriation of lands, the conferees agreed to an amendment in section 1 so that specific provision is made that the suit filed may be on account of the misappropriation of lands.

For the reasons stated, your managers receded from the disagreement to the Senate Amendment, and agreed to the same with the amendment referred to. As agreed to, *the bill follows the usual form of authorizing sub-*

mission of the claims of Indian tribes to the Court of Claims.

The agreement of the House to the conference report is, therefore, recommended. (Italics ours.)

The defendant contends that the claims for Class "B" and Class "C" lands, detailed in the amended petition filed May 7, 1934, are barred because not covered by the original petition. If plaintiff were entitled to recover, we think the amended petition is good under Paragraph VIII of the original petition and the second sentence of section 2 of the jurisdictional act.

The plaintiff tribe is not entitled, as a matter of law, to recover from the United States, and the petition must therefore be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

BROOKS-CALLAWAY COMPANY v. THE UNITED STATES

[No. 44809. Decided June 1, 1942]*

On the Proofs

Government contract; delays due to floods; "unforeseeable causes."—Where the contract provided that the contractor should not be assessed liquidated damages for delay due to unforeseeable causes, "including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather," it was *held* that liquidated damages should not have been assessed for delay due to a flood, whether or not the flood could have been foreseen, since the contract lists a flood as an unforeseeable cause.

Same; words and phrases; "floods."—In a contract waiving liquidated damages for a delay on account of a flood, a flood means any high water which causes a delay.

Same; "including."—In a contract waiving liquidated damages for unforeseeable causes, "including, but not restricted to" certain things named, the things named are held to be unforeseeable causes. *Albina Marine Iron Works* v. *United States*, 79 C. Cls. 714, reaffirmed.

*Reversed by the Supreme Court, 318 U. S. 120; *post*, page 729.

The Reporter's statement of the case:

The original decision in this case, June 1, 1942, holding that the plaintiff was entitled to recover $3,660.00, was reversed by the Supreme Court February 1, 1943 (318 U. S. 120), and "the cause remanded with instructions to determine whether respondent is concluded by the findings of the contracting officer, and if not for a finding by the court whether the 183 days of high water or any part of that time were in fact foreseeable." See page 729, *post*.

Upon remand, decision in accordance with the opinion of the Supreme Court was rendered March 1, 1943, as set forth hereinafter below.

Mr. George R. Shields for the plaintiff. *King & King* were on the briefs.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Gaines V. Palmes* was on the briefs.

The court, on June 1, 1942, made special findings of fact as follows:

1. The plaintiff is a corporation organized under the laws of the State of Georgia.

2. On October 12, 1931, plaintiff and defendant entered into a contract whereby, for the consideration of 12 cents per cubic yard, place measurement, plaintiff agreed to furnish all labor and materials, and perform all work required for the construction of Item R 848, Missouri Bend Levee, Lots A, B, and C, containing approximately 2,300,000 cubic yards, situated in the Atchafalaya Front Levee District, and Item L 868, St. Gabriel Levee, Lots A, B, and C, containing approximately 1,750,000 cubic yards, situated in the Pontchartrain Levee District, both on the Mississippi River, in accordance with specifications, schedules, and drawings made a part of the contract. The contractor was required by the contract to commence work within 20 calendar days after the date of receipt of notice to proceed, and complete it within 450 calendar days thereafter. The material for the work was to be obtained from riverside borrow pits and from the existing levee to the extent indicated on the drawings.

The right-of-way and earth for constructing the levee was to be furnished without cost to the contractor. Except for about 85,000 cubic yards of riverside enlargement of an existing levee of Item A of the Missouri Bend, the work consisted of new levee, roughly paralleling an existing levee.

3. Paragraph 35 of the specifications provided:

> 35. Old levees, spurs, etc.—All existing levees, parts of levees, or spurs must be left intact, unless otherwise stated in paragraph 39 and shown on the plans that they may be cut. In all cases where material in the controlling levee is used or the controlling levee line weakened or destroyed in the construction of a new levee, the work shall be so planned and executed that the new levee or a spoil bank of a net grade and section prescribed by the contracting officer, but not exceeding the existing grade and section of the controlling levee, will be completed as the controlling levee is weakened or removed, in order that the work may, with the equipment or facilities available on the job, be promptly tied-in or connected with the controlling levee so as to furnish a continuous levee line for protection in an emergency. Construction plans covering the above requirements shall be submitted to the contracting officer. No method failing to provide this protection will be accepted and no material shall be removed from the controlling levee until such plans have been approved in writing by the contracting officer. These plans shall provide for a minimum number of tie-ins in an emergency. In the event that the construction of tie-in levees is required before the expiration of the contract period prescribed in paragraph 39 hereof, payment therefor will be made by the United States as prescribed in paragraph 37. Where the method of construction jeopardizes the safety of the controlling levee, the contracting officer reserves the right to suspend the contractor's operations for any period or periods of time during the flood season that in the opinion of the contracting officer is warranted, so as to eliminate danger of overflow by unseasonable construction and no claim shall be made by the contractor for damage or expense occasioned by such suspension of operations or occasioned by construction difficulties on account of the building of the tie-in levees.

4. Paragraph 37 of the specifications provided that:

> In anticipation of destructive floods during the progress of the work, the contracting officer may require a * * * *temporary protective* levee to be built in front

of the work, upon such location and of such dimensions as he may direct. If such a protective levee is built, the contractor will be paid the contract price per cubic yard * * *.

5. Article 9 of the contract provided:

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided, further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to

appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

The contracting officer for the United States was J. N. Hodges, Lieut. Col., Corps of Engineers, United States Army.

6. Notice to proceed was given to the contractor October 22, 1931. Both jobs were due to be completed on January 14, 1933. The Missouri Bend Levee was completed on March 22, 1933, and the St. Gabriel Levee on August 25, 1933.

7. Liquidated damages of $5,800 at $20.00 a day for a total delay of 290 days were deducted, at which plaintiff protested. Upon consideration of this protest the contracting officer found that plaintiff had been delayed by high water during the contract period 112 days on the Missouri Bend Levee, and 4 days on the St. Gabriel Levee, and that it had been further delayed by high water after the contract period for 162 days on the St. Gabriel Levee. He held that of the total delay due to high water 183 days was the delay normally to be expected on account of high water, and that 95 days could not have been anticipated. He, therefore, recommended that liquidated damages in the sum of $1,900 be remitted, but that the balance be retained. Settlement was made on this basis.

8. Of the $3,900 finally deducted for liquidated damages, $3,660 thereof was deducted for delays due to high water, which the contracting officer held could have been expected, and the balance of 12 days was delay alleged to be due to the requirement that plaintiff should start construction of the St. Gabriel Levee at the upstream end of the construction, instead of the downstream end. This is alleged to have necessitated the building of a tie-in levee, the building of which is alleged to have caused the delay. With reference to claim for this delay the contracting officer made the following findings:

(a) Right-of-way complications at no time during the construction of the St. Gabriel Levee interfered with the contractor's progress. Prior to commencement of operations on this job, there was some litigation over a piece of property which comprised a portion of the

right-of-way on Item C. The landowner in this case threatened suit against the Pontchartrain Levee Board and obtained a preliminary injunction enjoining the Levee Board from furnishing the Government the necessary right-of-way. Upon compromise, however, the suit was dismissed and the preliminary injunction issued in connection therewith, dissolved; all prior to actual commencement of work on St. Gabriel Levee. There were existent on Item B of St. Gabriel Levee, two irrigation ditches which traversed the right-of-way, but these were filled before construction of Item B commenced, consequently no delay due to irrigation facilities could ever have impeded work on this item. The only instance which might be considered as a possible exception to the pronouncement at the first of this paragraph, and for which an equitable adjustment was arranged, was that pertaining to the cemetery on Item C. This cemetery was only partially removed. It restricted the borrow pit area in that vicinity, necessitating lengthened haulage on the material placed in the stations opposite. This material was obtained from the controlling levee. Change Order No. 1, dated November 15, 1932, approved by the Chief of Engineers December 6, 1932, file 3504 (New Orls. 2nd D. O.) 1067/2, increased the price to be paid on the material involved in these stations, thereby giving the contractor all consideration that could reasonably be expected in such a case. There was included in the Change Order a stipulation which specified that no additional time would be allowed because of the price modification. Additional equipment could have been installed on this job at any time during the favorable working season, moreover, in most cases it is not essential that the installation of additional equipment be conditional upon the provision of certain rights-of-way. The contractor was informed in October, 1932, [sic] shortly after award of the contract and some months prior to actual commencement of construction, that, due to right-of-way difficulties being encountered at that time, which would probably be of only short duration, he should execute the work in a certain prescribed manner—such dictation being entirely within the province of the contracting officer's authority as established in paragraph 17 of the Standard Specifications. As mentioned previously, the difficulties in question were cleared up before operations on this job were initiated.

(b) The contractor contends that he was forced to build a tie-in on St. Gabriel Levee when the job was practically complete. Paragraph 35 of the Standard

Specifications invests in the contracting officer authority to order a tie-in and suspension of operations for any period of time which in his opinion is warranted. The order for the tie-in referred to was issued on January 6, 1933, reiterated on January 10, 1933, and construction on this was not begun until issuance of the second order. The contractor further contends that the tie-in was not necessary, and that the levee could have been completed before the existence of over-bank stages upon this locality. Any discretionary powers of the contractor in such instances are nonexistent as far as decisions relative to tie-in are concerned, the contracting officer having absolute authority in the matter. At the time the tie-in was ordered, the job was only 86% complete and the stage of the water on the Plaquemine gage, that in closest proximity to this work, was 15.1 feet. At the rate of progress being maintained at that time, completion could not have been effected until about March 25, 1933—exclusive of delays, which, were most imminent at that time—on which date the river stage was 23.0 feet. In the interim, however, the river rose to 26.6 feet on the Plaquemine gage, a rather high stage for this period. This office is not cognizant of the matter alluded to by the contractor in his statement, "* * * and by your method of figuring there would not have been any delay on the St. Gabriel job." Neither is it cognizant of the debit of $3,800.00 forced upon the contractor and alluded to by him in the second paragraph of the supplementary claim.

A copy of these findings was not furnished the plaintiff by the contracting officer, and in consequence no appeal was taken therefrom to the head of the department.

9. Paragraph 17 of the specifications attached to and forming a part of the contract provides:

> 17. *Order of work.*—The contracting officer shall have power to designate the exact localities at which the work shall be prosecuted; also the proportion of the force that shall be worked at any designated locality; and the time when sodding and other incidental work shall be done.

10. Plaintiff was notified by the contracting officer on October 27, 1931, to begin construction of St. Gabriel Levee at the upstream end thereof, due to the following:

> *Due to the inability of the Pontchartrain* Levee Board to furnish a continuous right-of-way throughout

the proposed area of operations under the contract, the work must be planned so as to minimize the possibility of delay occuring thereby. It is believed that the difficulty encountered will be of temporary duration and that the right-of-way will eventually be furnished.

Upon receipt of this letter plaintiff on October 30, 1931, replied as follows:

> We have your letter of Oct. 27th; we will begin operations as directed at the upstream end of the St. Gabriel Levee, Item 868-A, at Station 1273+16 and work south.

The right-of-way for the construction of lot C of the St. Gabriel Levee was obtained prior to the time that plaintiff was ready to begin work thereon.

11. Beginning on January 6, 1933, the Mississippi River in the proximity of the St. Gabriel Levee began to rise. On that date the river stage was at elevation 17.3; on January 7 it was at elevation 18.4; on January 8 it was at elevation 19.4; on January 9, at 20.4; and on January 10, at 21.4. Flood stages were predicted. On January 6 the contracting officer wired plaintiff as follows:

> Re Saint Gabriel Levee you are directed to construct tie-in to controlling line beginning as near lower side of cemetery as possible. Stop. Construction of new levee from present location of machine to point of tie-in must be expedited. Stop. Cross section to be not less than that of the existing levee. Stop. Detailed instructions will be issued by area engineer.

Upon receipt of this telegram, plaintiff orally protested the order to build a tie-in levee, and requested authority to continue working along the new levee line, and thus connect the new levee with the controlling levee in lieu of building a tie-in at an angle as directed. This request was denied, and on January 10, 1933, the following telegram was sent by the contracting officer to the plaintiff:

> Reference your conversation Chief Third Area St. Gabriel Levee, you are again directed to tie this levee in to controlling line as indicated in telegram dated January sixth.

No further protest against the order to construct the tie-in was made by plaintiff, and no appeal from the decision of the contracting officer was taken to the head of the department.

12. On January 10, 1933, there remained to be completed 1,484 feet of new levee, involving about 80,000 cubic yards of material. The tie-in required the construction of about 670 feet of levee, involving 27,951 cubic yards.

13. The order of the contracting officer directing the building of the tie-in levee was reasonable under the circumstances.

14. The sum of $3,900, so withheld as liquidated damages, has not been paid to the plaintiff in whole or in part.

The court on June 1, 1942, decided that the plaintiff was entitled to recover $3,660.00.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues the defendant for the amount deducted as liquidated damages for delay.

The plaintiff had a contract to build lots A, B, and C of the Missouri Bend Levee, and lots A, B, and C of the St. Gabriel Levee. Both jobs had to be completed within 450 calendar days from the date of notice to proceed. The Missouri Bend Levee was completed 67 days after the date set for completion, and the St. Gabriel Levee was completed 223 days later.

The defendant originally deducted $5,800 for liquidated damages for a total of 290 days beyond the termination date. The plaintiff filed claim for the amount deducted. The contracting officer, in acting upon this claim, found that the plaintiff had been delayed during the contract period by high water on the Missouri Bend Levee 112 days, and on the St. Gabriel Levee 4 days, and that the normal expected delay during this period was 83 days on the Missouri Bend Levee, and 2 days on the St. Gabriel Levee, leaving 31 days' delay due to high water which he held the contractor could not have foreseen. He also found that the plaintiff had been delayed by high water after the contract period 162 days on the St. Gabriel Levee, and none on the Missouri Bend Levee,

and that the normal expected delay on the St. Gabriel Levee was 98 days. He held that the plaintiff was entitled to a remission of liquidated damages for the unexpected delay due to high water in the sum of $1,900, and this sum was remitted. The defendant retains the balance of $3,900 liquidated damages for 195 days of delay, of which 183 days was delay due to high water, which the contracting officer held the contractor should have foreseen. The balance of 12 days was delay due to other causes hereafter to be mentioned.

The plaintiff says that it is entitled to recover the amount withheld for delay due to high water whether or not it could have been foreseen.

Article 9 of the contract provides for the deduction of liquidated damages for delay, with this proviso:

> *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather * * *.

This contractor, therefore, could not be penalized for delay due to unforeseeable causes. Among the things which are listed as unforeseeable causes are "acts of God, or of the public enemy, acts of the Government, fires, floods," etc. It, therefore, would seem to follow that no amount should have been deducted for delay due to a flood. But the defendant contends that the proviso refers only to such floods as are unforeseeable. We think this position in untenable. The proviso does not mention unforeseeable floods, unforeseeable acts of God, unforeseeable acts of the public enemy, unforeseeable acts of the Government, unforeseeable fires, etc. All these things are unforeseeable. The proviso mentions them as among the things that are unforeseeable. The only cause that is qualified is severe weather; the weather must be unusually severe. Floods are not qualified. Any flood is to be treated as an unforeseeable cause.

The construction of the word "including" is in harmony with the construction placed upon it by the courts in many

cases. See *Montello Salt Co.* v. *Utah*, 221 U. S. 452, and many other cases cited in Vol. 20 of "Words and Phrases," page 443, et seq.

This identical proviso was so construed in *Albina Marine Iron Works, Inc.* v *United States*, 79 C. Cls. 714.

If there is any doubt about the correctness of this construction, that doubt ought to be resolved against assessing the penalty.

The other question is whether or not high water which stopped the work is to be considered as a flood, even though it did not overflow the levee. Webster's dictionary defines a flood as "A great flow of water; a body of moving water; the flowing stream, as of a river; especially a body of water rising, swelling, and overflowing land." The word frequently signifies an overflow, but it is not restricted thereto. Here we are convinced that it should not be so restricted because it is mentioned as one of the causes of delay and, therefore, means any rise in the water which caused cessation of work and delayed the contractor in the completion of the work. Apparently the water overflowed the banks of the river, but did not overtop the levee.

Another delay for which liquidated damages were deducted was alleged to have been due to the requirement by the contracting officer that the work begin at the upstream portion of the work instead of the downstream portion, as the contractor desired. This is alleged to have necessitated the building of a tie-in levee in order to take care of approaching high water. Had the work started at the downstream end, it is alleged this would not have been necessary.

It was well within the province of the contracting officer to order the work to start at the upstream end of the construction. Paragraph 17 of the specifications reads:

> 17. *Order of work.*—The contracting officer shall have power to designate the exact localities at which the work shall be prosecuted; also the proportion of the force that shall be worked at any designated locality; and the time when sodding and other incidental work shall be done.

Moreover, when the contracting officer on October 27, 1931, directed the plaintiff to begin construction at the upstream

end of the work, the plaintiff replied on October 30, 1931, agreeing to do so. No protest against the order was entered.

The plaintiff also complains that it was unnecessary to build the tie-in levee, but that it should have been permitted to continue with the construction of the main levee.

It was within the discretion of the contracting officer to order the construction of this tie-in levee. Paragraph 37 of the specifications provides in part:

> In anticipation of destructive floods during the progress of the work, the contracting officer may require a * * * temporary protective levee to be built in front of the work, upon such location and of such dimensions as he may direct. If such a protective levee is built the contractor will be paid the contract price per cubic yard * * *.

When the building of this tie-in levee was ordered the river was rising at the rate of about a foot a day, and flood stages were predicted. The plaintiff believed that it could complete the construction of the levee before the flood arrived. But the contracting officer was of a different opinion, or at least thought that it would be risky to take this chance. This was a matter committed to his judgment.

Furthermore, when the plaintiff was first directed to build this tie-in levee, it orally protested and requested authority to continue working along the new levee line, but this request was refused and the plaintiff was directed to build the tie-in levee as ordered. Thereupon, plaintiff proceeded to build it without further protest, and without any appeal to the head of the department. Under such circumstances the plaintiff cannot complain here of the order of the contracting officer.

Plaintiff is entitled to recover of the defendant liquidated damages deducted for the 183 days it was delayed by high water, or a total of $3,660.00. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, dissenting in part:

Plaintiff claims the right to an extension of the time of performance of the contract for the number of days that it

was delayed by high water which made work on the project impossible, even though such high water and the greater part of its duration was normal, seasonal, and anticipated. Plaintiff bases this argument upon the following portion of Article 9 of the contract:

> *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: * * *.

I think plaintiff's interpretation of this provision is not tenable. The whole purpose of the proviso is to prevent contractors from being penalized by forfeiture of their contracts or by the assessment of liquidated damages because they encounter unanticipated obstacles to prompt performance. The proviso is advantageous to the Government also because it enables bidders to submit bids based, so far as the perils of forfeiture and liquidated damages are concerned, on normal and foreseeable events, rather than upon events which might occur, although they probably will not. In accordance with this purpose, and with the normal meaning of the words in the sequence in which they are here found, the events listed under the "including" phrase must each be intended to be unforeseeable. Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso. The contract might be one to excavate for a building in an area where a coal mine had been on fire for years, well known to everybody, including the contractor, and where a large element of the contract price was attributable to this known difficulty. A quarantine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government. A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there would be no possible reason why the contractor, who of course anticipated

these obstacles in his estimate of time and cost, should have his time extended because of them.

The same is true of high water or "floods." The normally expected high water in a stream over the course of a year, being foreseeable, is not an "unforeseeable" cause of delay. Here plaintiff's vice-president testified that in making its bid plaintiff took into consideration the fact that there would be high water and that when there was, work on the levee would stop. Without this testimony we would have known that plaintiff did so. Its time was extended, in the contract, for normal and foreseeable high water. There is no reason why we should grant a further extension of the same number of days for the same cause. Allowance should be made, as was done by the contracting officer, only for the number of days of unforeseeable high water.

I do not regard the provision for an agreed sum as liquidated damages for noncompletion of the work at the time set by the contract as penal in its nature, so as to justify a forced interpretation of the language of the contract, leaving the defendant without remedy for the breach of the contract, according to its normal meaning.

ON REMAND BY THE SUPREME COURT

[Decided March 1, 1943]

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on remand by the Supreme Court with instructions to determine whether respondent is concluded by the findings of the contracting officer on the question of delays due to high water, and, if not, for a finding whether the 183 days of high water or any part of that time were in fact foreseeable.

We did not make a finding on the finality of the findings of the contracting officer, which the Supreme Court denominates a threshold determination, because in this court neither of the parties raised such an issue either at the threshold of the case or at any other time. They did not raise such an issue because the contracting officer's findings apparently were sent direct to the Comptroller General and were never

sent to the plaintiff. The plaintiff appears to have been first advised of them by the Comptroller General in making final settlement of the amount due under the contract.

The only evidence relative thereto is plaintiff's exhibit No. 2, which is correspondence between the parties relative to plaintiff's claim for remission of liquidated damages deducted. This shows that on January 25, 1934, the plaintiff inquired of the office of the United States Engineer of the Second New Orleans District as to the status of its claim for remission of liquidated damages. On January 25, 1934, that office acknowledged receipt of the claim and stated that it would be investigated "and the claim will be forwarded to the General Accounting Office for settlement." On January 27, 1934, the plaintiff asked the United States Engineer's Office to advise it "as soon as your recommendations have been sent to Washington so that we may follow up this claim for payment." In reply plaintiff was advised on February 17, 1934 that its claim "was forwarded on February 14 to the General Accounting Office with recommendations and is now on its way through proper channels to final settlement." Nothing further appears until the "Notice of Settlement of Claim," dated April 10, 1934, was forwarded to plaintiff by the Comptroller General. This sets out the findings of the contracting officer on this question as follows:

> The contracting officer has found with respect to the delay in the completion of Section C of the Missouri Bend Levee that there was a delay of 112 calendar days on account of high water during the contract period, that the normal expected delay on account of high water during this period was 83 days, that the normal expected delay subsequent to the contract period was 42 days and that the delay due to high water during the contract period occurred on Section A, which delay postponed the commencement of work on Section C. The contracting officer then finds that the delay which occurred on Section A of the Missouri Bend Levee caused a delay of 29 days in the completion of Section C. It therefore appears that there was an unforeseeable delay of 29 days in the completion of this Section.
>
> With respect to the delay in the completion of Section C of the St. Gabriel Levee the contracting officer has found that there was a delay of 166 calendar days on account of high water, of which 100 calendar days were

considered foreseeable, being the normal expected delay for the period. It therefore appears that there was an unforeseeable delay of 66 days in the completion of this Section due to high water.

With reference to the delay in the beginning of work on Section C of the St. Gabriel Levee on account of the failure of the Levee Board to furnish right of way, the contracting officer has found that the injunction enjoining the Levee Board from furnishing the necessary right of way was dissolved prior to the actual commencement of work on this Section, consequently the remission of liquidated damages alleged to have been deducted for this reason is not authorized.

It appearing that the contractor was delayed 29 calendar days in the completion of Section C of the Missouri Bend Levee and 66 calendar days in the completion of Section C of the St. Gabriel Levee, because of unforeseeable conditions over which it had no control, the remission of liquidated damages for 95 days at $20.00 per day or $1,900.00 is allowed.

The contracting officer having found that the cause of the other delays were not excusable under the terms of the contract, such finding is final and conclusive and it follows that no amount in excess of $1,900.00 may be allowed.

Since the defendant did not contend that the findings of fact of the contracting officer were conclusive, there was no positive evidence that this was the first time plaintiff was apprized of these findings, but it is to be inferred that it was.

This was long after the work had been concluded. The work on the Missouri Bend Levee was completed on March 22, 1933, and on the St. Gabriel Levee on August 25, 1933; the communication from the General Accounting Office was dated April 10, 1934. These findings of fact not having been communicated to plaintiff prior to final settlement by the General Accounting Office, there was no opportunity to appeal to the head of the department as provided for in the contract, and the findings of fact of the contracting officer, therefore, are not conclusive on the parties in this case. Cf. *Austin Engineering Company* v. *United States*, No. 43364, decided October 5, 1942, 97 C. Cls. 68. After this final settlement had been made the department concerned no longer had jurisdiction of the matter. The settlement was

final and conclusive upon it. Act of July 31, 1894, c. 174, sec. 8, 28 Stat. 208, as amended by sec. 304 of the Act of June 10, 1921, 42 Stat. 24. The time for appeal to the head of the department was before final settlement, not after. This right of appeal was denied plaintiff by the failure of the contracting officer to apprize it of his findings.

Were the 183 days of high water foreseeable?

During the taking of testimony plaintiff's counsel conceded that high water was to be expected every year. He stated, in fact, that he relied upon the contracting officer's decision. That officer determined that 183 days of high water were foreseeable. This was based on a daily record of the stages of the river at the location of the levee over a ten-year period. For the period of time covered by the contract the average number of days of high water over this ten-year period was 183 days.

In accordance with the above the court made the following

SUPPLEMENTAL FINDINGS OF FACT

1. The findings of fact of the contracting officer on the number of days of delay due to high water, which were foreseeable and which were not foreseeable, were not communicated to the plaintiff. It was not advised thereof until April 10, 1934, when it received the notice of final settlement from the Comptroller General. The Missouri Bend Levee had been completed on March 22, 1933, and the St. Gabriel Levee on August 25, 1933.

No appeal was taken from the contracting officer's findings to the head of the department.

2. Based upon the experience of the eight or ten years preceding the execution of the contract, the plaintiff reasonably should have expected that it would be delayed by floods during the performance of the contract a total of 183 days.

The conclusion of law heretofore rendered was vacated and there was substituted in lieu thereof the following

CONCLUSION OF LAW

Upon the special findings of fact, as above supplemented, which are made a part of the judgment herein, the court

concludes as a matter of law that plaintiff is not entitled to recover and its petition is dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

The Supreme Court having held that the plaintiff was not entitled to remission of liquidated damages if high water was foreseeable for the period stated, plaintiff is not entitled to recover and its petition, therefore, is dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the consideration of this case on remand.

WILLIAM RALPH ABRAHAMSON v. THE UNITED STATES

[No. 45135. Decided December 7, 1942]

On the Proofs

Pay and allowances; bachelor officer in Quartermaster Corps Reserve, U. S. Army.—It is *held*, upon the evidence adduced, that under the provisions of sections 4, 5 and 6 of the Act of June 10, 1922 (42 Stat. 625) as amended by the Act of May 31, 1934 (43 Stat. 250) plaintiff, a bachelor officer in the Quartermaster Corps Reserve, U. S. Army, with dependent mother, is entitled to recover for increased rental and subsistence allowances.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the briefs.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Miss Stella Akin* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff, William Ralph Abrahamson, is a bachelor officer in the Quartermaster Corps Reserve, United States Army. The following is the record of plaintiff's service: Appointed second lieutenant in the Quartermaster Corps

Reserve June 7, 1932, accepted June 27, 1932; appointed first lieutenant August 30, 1935, accepted September 3, 1935; appointed captain September 13, 1939, accepted September 19, 1939. Plaintiff was on active duty from September 10, 1934, to September 23, 1934; from March 12, 1935, to September 11, 1939; from June 2, 1940, to June 29, 1940; from July 1, 1940, to July 28, 1940, and from August 14, 1940, to April 10, 1941, the date on which the War Department prepared its reply pursuant to the call issued by this court.

2. Plaintiff's father, Charles Magnus Abrahamson, died in 1928. At the time of his death he was purchasing a house, the title to which was held in the name of his wife, plaintiff's mother. This property was lost in 1933 through foreclosure for nonpayment of taxes and interest, and nothing whatever was realized by plaintiff's mother from the sale. Since that date plaintiff's mother has owned no real or income-producing personal property. Plaintiff's father left a small amount of insurance, which was used to defray his funeral expenses.

3. Plaintiff's mother was 80 years old in July 1941. She has been in poor health at all material times, and because of her advanced age has not been able to hold any gainful employment.

4. For about nine months during each year of the period March 12, 1935, to August 17, 1937 (and for sometime prior thereto), plaintiff's mother lived with a daughter, Mrs. Boulton, in Haddonfield, New Jersey, and the remaining three months of each year with another daughter, Mrs. Cobb, in Bethlehem, Pennsylvania. During this period plaintiff paid the sister with whom his mother was staying $20 a month for board and room, and also paid storage on her furniture of approximately $6 a month, doctors and medicine approximately $10 a month, and approximately $5 a month for incidental expenses. While with her daughters the mother assisted them, to some extent, as best she could, with their household duties.

5. From August 17, 1937, to June 1, 1940, the mother resided with the plaintiff, first in a home at 2364 48th Street, Camden, New Jersey, where they lived until October 1, 1939, and then in an apartment at 4400 Westville Avenue, Camden,

New Jersey. The average joint household expenses of plaintiff and his mother while they lived in the house on 48th Street amounted to approximately $101 a month and consisted of the following items: Rent $30, food $30, coal $8, gas and electricity $10, laundry $8, magazines and newspapers $4, servant $7.50, and telephone $3.50. In addition the mother incurred doctor and medical bills amounting to approximately $10 a month, and $5 per month for incidental expenses.

While living at 4400 Westville Avenue, the joint household expenses increased about $8 or $9 a month, which was caused by the difference in the rental of $45 paid for the apartment and the $30 paid for the house on 48th Street, less the cost of the coal required to heat the house, heat having been furnished them in the apartment. All other items of household expense and the mother's personal items of living expense remained about the same.

During the period from August 17, 1937, to June 1, 1940, the plaintiff paid all the joint household expenses and the mother's personal items of living expenses, while she lived with him, and in addition spent about $800 for furniture and other household articles.

During this period Mrs. Abrahamson did the household work, except heavy cleaning for which someone was employed each week, and also tended the furnace until the son felt she was no longer physically able to do that and changed to the apartment.

6. On June 1, 1940, plaintiff received orders to report for duty in Baltimore, Maryland, and rather than take his mother to Baltimore so far from the rest of her children, he arranged for her to live with her daughter, Mrs. Anna Davenport, in Collingswood, New Jersey. The mother was still residing with her daughter in Collingswood, New Jersey, on February 13, 1941, when the last testimony was taken in this case, and during the period from June 1, 1940, to February 13, 1941, plaintiff paid his sister, Mrs. Davenport, $35 each month to defray the cost of his mother's room and board. Besides paying the sister for the mother's room and board, plaintiff also paid her doctor and medical bills, amounting to about $10 a month, the storage charges

on her furniture amounting to about $7.50 a month, and gave her about $5 a month for incidental expenses.

7. Plaintiff has three sisters and two brothers all of whom are married. These brothers and sisters were in more or less straitened financial circumstances during the period here involved, except the daughter, Mrs. Davenport, with whom plaintiff's mother resides in Collingswood, New Jersey. At the time of the taking of her testimony on January 27, 1941, Mrs. Davenport's husband was making approximately $175 a month, and their only child, a daughter of 21, was a student at the University of Pennsylvania. She had a job paying $16 a week, which amount she used for her expenses at the University and paid nothing to her parents for room and board. The Davenports own a home worth about $5,500 which they bought on the installment plan and which at the time of the hearing in January 1941 lacked about a year of being paid out.

During the period of this claim none of the brothers and sisters rendered any substantial assistance toward the support of their mother.

8. If plaintiff is entitled to the difference in rental and subsistence allowances of an officer of his rank and length of service with a dependent, and the rental and subsistence allowances of an officer of his rank and length of service without dependents, there is due him the sum of $2,094.27, representing the difference in the said allowances, for the period from March 12, 1935, to December 31, 1940, the date of the latest available pay roll on file in the General Accounting Office. His claim, however, is a continuing one.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

The plaintiff, a captain in the United States Army, sues to recover increased rental and subsistence allowances because of a dependent mother, basing his claim upon sections 4, 5, and 6 of the act of June 10, 1922 (42 Stat. 625) as amended by the act of May 31, 1924 (43 Stat. 250).

Section 4 of the 1922 act (42 Stat. 625, 627) provides in part—

> That the term "dependent" * * * shall also include the mother of the officer providing that she is in fact dependent upon him for her chief support.

The facts are set forth in detail in the findings and will not be repeated here.

Under the uniform rule announced by this court in numerous decisions as to what constitutes the dependency of a mother under this statute the plaintiff in this case is entitled to recover.

The findings disclose that he was not only the chief support of his mother during the period of the claim, but that he was in fact her only support. While the mother had other children, all but one were in straitened financial circumstances, and none of them rendered any substantial assistance toward her support.

The plaintiff is entitled to recover the increased rental and subsistence allowances provided by law for an officer of his rank, on account of a dependent mother, from March 12, 1935, to date of judgment herein. Entry of judgment, however, will await the receipt of a report from the General Accounting Office showing the amount of the allowances due the plaintiff in accordance with this opinion.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

In accordance with the above opinion and upon reports from the General Accounting Office showing the amount due thereunder for the period from March 12, 1935, to December 31, 1940, to be $2,094.27, and for the period from January 1, 1941, to December 7, 1942, to be $876.10, a total of $2,970.37, and upon plaintiff's motion for judgment, it was ordered April 5, 1943, that judgment for the plaintiff be entered in the said sum of $2,970.37.

CHARLES E. LEYDECKER v. THE UNITED STATES

[No. 45299. Decided December 7, 1942]

On the Proofs

Pay and allowances; bachelor officer in U. S. Army with dependent mother.—It is *held* that, on the evidence adduced, plaintiff, a bachelor officer in the U. S. Army with dependent mother, is entitled to recover for rental and and subsistence allowances.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the brief.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff was appointed a 2nd Lieutenant of Cavalry, United States Army, on June 13, 1933; was promoted to 1st Lieutenant June 13, 1936, and to Captain (temporary) September 9, 1940. His active commissioned service has been continuous since June 13, 1933.

2. Plaintiff's mother, Ada B. Leydecker, who is 54 years of age, was divorced from her husband, Philip L. Leydecker, in October 1921, since which time he has contributed nothing to her support. Plaintiff is her only child. She owns no real or income-producing personal property. She was employed as a receptionist by the State Relief Agency of California at $100 a month from the latter part of 1934 until about December 1935, when she was appointed supervisor of a Works Progress Administration sewing project at the same salary. She continued in this position for four or five months, when she again obtained employment with the State Relief Agency of California, where she remained from about January 1937 to June 30, 1937, when the Agency reduced its personnel and she was dropped from the rolls. She has been unemployed since that time although she has sought work.

3. Plaintiff's mother has lived with him since 1934, first at the Presidio of Monterey, California, where they remained until about July 1937, when he was transferred to Fort Riley,

Kansas. They lived at Fort Riley until July 14, 1938, when he was transferred to Fort Knox, Kentucky, where they are residing at present. Since 1934 plaintiff and his mother have occupied quarters assigned to him, which quarters have been adequate for an officer of his rank and length of service with a dependent. They have occupied Government quarters continuously since January 1, 1938, with the exception of the period from July 15, 1938 to August 13, 1938, during which time plaintiff was in a "travel status" and no quarters at his permanent station were assigned to him.

4. The actual monthly living expenses of plaintiff's mother since January 1, 1938 have been approximately as follows: $22.50 to $25 for food; $20 for clothing, incidental, and medical expenses; $5 for laundry; $5 for a part-time servant; $5 for an orderly who performs the heavy work around their home; and $10 for the operation of a car. These items constitute the mother's pro rata share of the joint household living expenses, with the exception of the item for clothing, incidental, and medical expenses. Since January 1, 1938, plaintiff has paid all of his mother's living expenses. Plaintiff and his mother have a joint checking account and either of them signs the checks for payment of these expenses.

Plaintiff's mother enjoyed good health while they lived at Fort Riley, Kansas, but since they have resided at Fort Knox, Kentucky, she has required considerable medical treatment, which has been furnished her by Army medical officers without cost. She is required, however, to pay for the medicine she uses.

5. Since 1934 plaintiff has filed several claims for increased rental and subsistence allowances on account of a dependent mother, but they have been disallowed by the General Accounting Office.

6. Plaintiff received an additional subsistence allowance on account of a dependent mother for the period January 1, 1938 to August 31, 1938, and an additional rental allowance from July 15, 1938 to August 13, 1938 (finding 3), amounting in all to $165.13. The General Accounting Office later suspended credit for this sum and deducted it from plaintiff's pay.

7. Plaintiff is entitled to rental and subsistence allowances on account of a dependent mother from January 1, 1938 to May 31, 1940 (the date of the latest available roll in the General Accounting Office), in the amount of $383.40 for the period from September 1, 1938 to May 31, 1940, 639 days at 60 cents a day, and also to $165.13, as set out in finding 6. This is a continuing claim.

The court decided that the plaintiff was entitled to recover in an opinion *per curiam*, as follows:

The defendant does not deny plaintiff's mother was solely dependent upon him for support. It is clear that she was. Accordingly, plaintiff is entitled to the additional allowance for a dependent, as provided for by law. See *Barnes* v. *United States*, 95 C. Cls. 411; *Ficklen* v. *United States*, 95 C. Cls. 531; *Van Auken* v. *United States*, No. 44646, decided by this court November 2, 1942.

Entry of judgment will be suspended until the incoming of a report from the General Accounting Office showing the amount due computed in accordance with the foregoing findings and this opinion. It is so ordered.

In accordance with the above opinion and upon a report from the General Accounting Office showing the amount due thereunder to be $1,119.53, and upon plaintiff's motion for judgment, it was ordered April 5, 1943, that judgment for the plaintiff be entered in the sum of $1,119.53.

Plaintiff's motion to vacate the above judgment and to obtain further information from the General Accounting Office was overruled April 28, 1943.

RICHARD I. CRONE v. THE UNITED STATES

[No. 45893. Decided December 7, 1942]

On the Proofs

Pay and allowances; bachelor officer in Medical Corps, U. S. Army, with dependent mother.—It is *held* that plaintiff, a bachelor officer in the Medical Corps, U. S. Army, with dependent mother, is entitled to recover for additional rental and subsistence allowances.

Same.—There is no proof to show that the mother's dependency was deliberately created.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the briefs.

Mr. E. Leo Backus, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Richard I. Crone, a bachelor officer, accepted appointment as first lieutenant, Medical Section, Officers' Reserve Corps, May 27, 1935, and was on active duty from January 1, 1939, to March 9, 1939. He accepted an appointment as first lieutenant, Medical Corps, in the Regular Army, on March 10, 1939, and an appointment as temporary captain October 3, 1940, to rank from September 9, 1940, and has served continuously at least up to October 20, 1941, the date of hearing in this case.

2. Plaintiff's mother was divorced from her husband, Maurice B. Crone, in August 1933. The divorce decree provided that the husband was to pay alimony of $75 a month, and that sum was paid continuously until April 25, 1939. Prior to the termination of the alimony payments the ex-husband began writing plaintiff's mother to the effect that he was no longer financially able to keep them up. Her lawyer investigated Mr. Crone's financial condition and after satisfying himself that he was unable to make further payments of alimony, entered into a stipulation by which the order of judgment requiring payment of alimony was modified and the ex-husband was relieved from further payment thereof pend-

ing a further order of the court. This stipulation, a copy of which is in evidence as defendant's Exhibit 1, and is made a part of this finding by reference, was submitted to and approved by the court (Superior Court of the State of California, Los Angeles County) which had granted the divorce.

3. The testimony indicates that Maurice B. Crone had always had difficulty in meeting his obligations. He had borrowed several thousand dollars from his wife's parents to make part payment on a home. The property was heavily mortgaged and at about the time of the divorce, in order to prevent foreclosure by the first-lien holders, it was sold at a sacrifice. The net proceeds of the sale were used to repay in part the amount owing the wife's parents, and to take care of some of his personal obligations. At the time of the divorce he was not working for a specific salary, but his firm allowed him a drawing account of $300 a month, out of which he was required to pay his own traveling expenses. By April 1939 he had become so heavily indebted to the firm that it discontinued the drawing account.

4. Plaintiff's mother is fifty-one years of age and has engaged in no gainful employment since May 1, 1939.

Since the early part of 1937 the mother of plaintiff has resided with him. Their average monthly living expenses from May 1, 1939, to July 18, 1940, totaled about $125, and from July 18, 1940, to October 20, 1941, the date of the hearing, about $175. These expenses were defrayed by the plaintiff.

Since May 1, 1939, plaintiff's mother has received no income or revenue of any kind, nor has she owned either real or income-producing personal property.

5. During the period May 1, 1939, to July 18, 1940, plaintiff's mother resided with him at Fort Douglas, Utah, where they occupied quarters assigned to him on the post, the quarters being adequate for an officer of his grade and rank with a dependent.

Since July 18, 1940, it has been necessary for plaintiff to rent quarters for his mother and himself.

6. During the period from May 1, 1939, to October 20, 1941, the date of the hearing, plaintiff was allowed only the subsistence allowance of an officer of his grade and rank

without dependents, and since July 18, 1940, and up to the date of hearing, he has been allowed only the rental allowance of an officer of his grade and rank without dependents.

7. Beginning with January 31, 1939, and throughout the years 1939 and 1940, the plaintiff at various times filed claims requesting additional rental and subsistence allowances by reason of a dependent mother, all of which were disallowed by the Comptroller General. Copies of these claims (defendant's exhibits 2, 3, and 4) are made a part of this finding by reference.

8. If entitled to additional subsistence allowance as an officer of his rank and length of service with a dependent for the period from May 1, 1939, to July 18, 1940, and since that date to the additional rental and subsistence allowances of an officer of his rank and length of service with a dependent, there is due plaintiff the sum of $321.40, representing the amount of such allowances for the period from May 1, 1939, to August 31, 1940, the date of the last available pay record on file in the General Accounting Office. This amount is set forth in the reply of the General Accounting Office.

This claim is a continuing one.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

Plaintiff, a captain in the Medical Corps of the United States Army, sues for increased rental and subsistence allowances on account of a dependent mother for the period beginning May 1, 1939. The facts are set forth in the findings and will not be repeated in detail.

The claim is based upon sections 4, 5, and 6 of the act of June 10, 1922 (42 Stat. 625), as amended by the act of May 31, 1924 (43 Stat. 250).

Section 4 of the 1922 act (42 Stat. 627) provides, in part—

> That the term "dependent" * * * shall also include the mother of the officer, providing that she is in fact dependent upon him for her chief support.

Plaintiff accepted appointment as first lieutenant in the Medical Section, Officers' Reserve Corps, United States Army,

on May 27, 1935. He accepted appointment as first lieutenant, Medical Corps, United States Army, on March 10, 1939, and was promoted to temporary captain on October 3, 1940, with rank from September 9, 1940. He has served continuously on active duty since March 10, 1939.

Plaintiff's mother was divorced from her husband, Maurice B. Crone, in September 1933, and was awarded alimony of $75 a month, which payments were made through April 1939. Since the early part of 1937 she has resided with her son, who defrayed their joint living expenses. The alimony payments were applied as payments on the ex-husband's obligation to Mrs. Crone's parents.

The undisputed testimony shows that plaintiff has been not only the chief but the sole support of his mother since May 1, 1939. Since that date she has received no income or revenue of any kind, nor has she owned any real or income-producing personal property.

The defendant raises the question of whether there was actual dependency, basing it upon the allegation that the alimony payments were voluntarily surrendered.

The facts of record do not support this contention.

The evidence shows that the ex-husband had always had difficulty in meeting his obligations. Prior to the granting of the divorce he had borrowed $9,000 from his wife's parents and had used at least a part of this sum for making a payment on a home. The property was heavily mortgaged for the balance of the purchase price and he was unable to meet the payments. At about the time the divorce was granted the property was sacrificed in order to prevent foreclosure. The net proceeds of the sale were used by the husband to make part payment of his obligation to his wife's parents and to pay some of his personal obligations. At the time of the divorce, he was not working for a definite salary, but was traveling for a firm which allowed him an advance or drawing account of $300 a month, out of which he was required to pay his own traveling expenses. By 1939 he had become so greatly indebted to the firm that the drawing account was discontinued. He advised his former wife that he was unable to continue making the alimony payments.

At that time she was living with the plaintiff at Ft. Douglas, Utah, and not being financially able to make a trip to Los Angeles, California, she asked her lawyer in Los Angeles to make an investigation of the ex-husband's financial condition. After making such investigation the lawyer became satisfied that Mr. Crone was financially unable to continue the alimony payments. A stipulation to that effect was made and the court approved the same and ordered the discontinuance of such payments, pending further order.

There is no proof whatever in the record to raise the question of the accuracy of these findings, or to show that the ex-husband could have continued making the payments.

The plaintiff has been the sole support of his mother since May 1, 1939, and the record wholly fails to sustain defendant's contention that the mother's dependency was deliberately created.

Plaintiff is entitled to recover the increased rental and subsistence allowances provided by law for an officer of his rank because of a dependent mother from May 1, 1939, to date of judgment herein. Entry of judgment will await the receipt of a report from the General Accounting Office showing the amount of the allowances due the plaintiff in accordance with this opinion.

It is so ordered.

Madden, *Judge;* Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

In accordance with the above opinion and upon report from the General Accounting Office showing the amount due thereunder to be $1,407.40, and upon plaintiff's motion for judgment, it was ordered April 5, 1943, that judgment for the plaintiff be entered in the sum of $1,407.40.

CASES DECIDED
IN
THE COURT OF CLAIMS
July 1, 1942, to January 31, 1943

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. D–388. October 5, 1942

Robert Esnault-Pelterie.

Infringement of patent on airplane controls. This case was decided by the Court of Claims November 4, 1935, the patent in suit No. 1,115,795, being held valid and to have been infringed by the Government (81 C. Cls. 785). The court's conclusions as to the validity and infringement of the patent appeared from its conclusion of law and opinion but were not included in its special findings of fact; and on certiorari the Supreme Court held (299 U. S. 201) that findings on these questions should be included in the special findings of fact, and remanded the case to the Court of Claims for such findings.

Thereupon, the Court of Claims entered an order (84 C. Cls. 625) amending the previous findings of fact in accordance with the mandate of the Supreme Court, declaring the patents in suit to be valid and infringed, and entering a new interlocutory judgment deciding as a conclusion of law that plaintiff's patent was valid and infringed by the United States and that plaintiff was entitled to recover.

Upon certiorari the judgment of the Court of Claims was affirmed by the Supreme Court January 31, 1938 (303 U. S. 26).

Upon a stipulation filed June 30, 1942, by the parties, stating among other things, that "7,500 airplanes is the entire number of airplanes having the infringing control machines covered by the Esnault-Pelterie United States

patent No. 1,115,795 in suit that were manufactured by or for and used by the United States within the accounting period covered by the original and the several supplemental petitions in this case for which compensation is claimed," and that the total of the base royalty fee on said airplanes amounts to $275,833.74, together with interest on the same at four percent per annum from the dates of acquirement of the airplanes involved to December 31, 1941, in the sum of $234,027.10, a total of $509,860.84, together with interest on the base royalty fee of $275,833.74 at four percent per annum from January 1, 1942, until paid as part of the entire compensation, it was ordered October 5, 1942, upon the plaintiff's motion for judgment, that judgment be entered for the plaintiff in the sum of $509,860.84 together with interest on the base royalty fee amounting to $275,833.74 at four percent per annum from January 1, 1942, until paid, said interest being not as interest but as part of the entire compensation.

DEPARTMENTAL No. 173. OCTOBER 5, 1942

Therese Marie Moreno.

The claim in this case was transmitted to the Court of Claims by the Acting Comptroller General of the United States, the question involved being the right of the mother or of the widow of one Joseph de Roulhac Moreno, deceased, major, Medical Corps, U. S. Army, to collect the six months' death gratuity pay authorized by the act of December 17, 1919, 41 Stat. 367. March 30, 1940, Frances de Roulhac Moreno, the mother of the decedent, filed her petition in the court, and on April 4, 1940, Therese Marie Moreno, the widow of the decedent, likewise filed her petition, each claiming the amount of the six months' gratuity. On April 7, 1941, on her motion therefor, the petition of said Frances de Roulhac Moreno, the mother, was dismissed by the court (93 C. Cls. 770). On August 7, 1942, after the report of a commissioner had been filed, a stipulation was filed by the parties, agreeing that judgment be entered in favor of Therese Marie Moreno in the sum of $1,950; and on October 5, 1942, judgment in said amount was entered upon plaintiff's motion.

No. 44353. OCTOBER 5, 1942

Peter Lomax, Administrator of the Estate of John Lomax, deceased.

Pay and allowances; retirement of enlisted man after 30 years' service; demotion after retirement application. Plaintiff entitled to recover. Opinion 95 C. Cls. 524.

In accordance with its opinion of February 2, 1942, and upon a report from the General Accounting Office as to the amount due thereunder, judgment was entered for the plaintiff in the sum of $2,926.47.

No. 44870. OCTOBER 5, 1942

Wilmon Tucker, Administrator, Estate of Sarah E. Smith.

Income tax. Defendant's demurrer overruled, January 5, 1942. Opinion 95 C. Cls. 415.

Petition dismissed on plaintiff's motion October 5, 1942.

No. 44660. NOVEMBER 2, 1942

Central National Bank of Cleveland, as Executor of the Estate of William G. Wilson, deceased.

Estate tax; transfer under trust instrument effective upon grantor's death. Plaintiff entitled to recover. Opinion 94 C. Cls. 527.

In accordance with its opinion of October 6, 1941, and upon a stipulation by the parties showing the amount due thereunder, judgment was entered for the plaintiff in the sum of $37,293.58, with statutory interest on $34,410.46 from May 6, 1938, and on $2,883.12 from May 21, 1938.

No. 44995. NOVEMBER 2, 1942

Edward White Rawlins.

Pay and allowances; rental and subsistence allowance of Navy officer separated from wife. Plaintiff entitled to recover. Opinion 93 C. Cls. 231.

In accordance with its opinion of March 3, 1941, and upon a report from the General Accounting Office showing the amount due thereunder, judgment was entered for the plaintiff in the sum of $2,848.80.

No. 44076. DECEMBER 7, 1942

George William Hall.

Claim for personal injuries sustained by plaintiff on December 14, 1927, while handling mails of the United States, referred to the Court of Claims under special act approved April 27, 1938 (52 Stat. 1300).

Upon a stipulation filed by the parties and upon a report of a commissioner, judgment for the plaintiff was entered in the sum of $11,000.

No. 45210. DECEMBER 7, 1942

Boudin Contracting Corporation.

Government contract for rehabilitation of the Bethlehem Sugar factory on the Island of St. Croix, Virgin Islands. Upon a stipulation by the parties and agreement to compromise, filed October 19, 1942, judgment was entered for the plaintiff in the sum of $93,814.56.

No. 43269. JANUARY 4, 1943

Fred J. Rice and W. Cameron Burton, Receivers for D. C. Engineering Company, Inc.

Government contract; excess cost due to delay; responsibility of Government. Decided December 1, 1941; judgment for the plaintiff. Opinion 95 C. Cls. 84.

Reversed by the Supreme Court November 9, 1942; 317 U. S. 61; 96 C. Cls. 609.

In accordance with the decision of the Supreme Court, reversing the judgment of the Court of Claims and remanding the case for further proceedings, the petition was dismissed.

No. 43102. JANUARY 4, 1943

Callahan Walker Construction Company.

Government contract; decision of contracting officer. Decided January 5, 1942; judgment for the plaintiff. Opinion 95 C. Cls. 314.

Reversed by the Supreme Court November 9, 1942; 317 U. S. 56; 96 C. Cls. 616.

In accordance with the decision of the Supreme Court, reversing the judgment of the Court of Claims and re-

manding the case for further proceedings, the petition was dismissed.

No. L-88. JUNE 1, 1942

The Seminole Nation.

Indian claims; lands taken; accounting for collections of annual charges.

Defendant's demurrer sustained, and petition dismissed, following the decision in *The Creek Nation* v. *The United States* (No. F-369), *ante*, page 591.

Affirmed by the Supreme Court April 5, 1943. See *post*, page 735.

JUDGMENTS ENTERED

In accordance with the provisions of the Act of June 25, 1938, (52 Stat. 1197) and on motion of the several plaintiffs (to which no objection had been filed by the defendant), and upon the several stipulations by the parties, and in accordance with the report of a commissioner in each case recommending that judgment be entered in favor of the respective plaintiffs in the sums named, it was ordered that judgments be entered as follows, for increased costs under the National Industrial Recovery Administration Act:

ON OCTOBER 5, 1942

No. 44082. The Lamson Company, Inc	$8,902.00
No. 44283. Joseph Black & Sons Company	5,285.15
No. 44287. Forrest F. Attaway, Trading as Atlanta Tile and Marble Co	981.57
No. 44451. Willingham-Tift Lumber Company	988.81

ON NOVEMBER 2, 1942

No. 44414. Myrtle Desk Company	$9,000.00
No. 44415. High Point Bending and Chair Co	2,500.00
No. 44418. John J. McCann Company, a Corp	553.25

ON DECEMBER 7, 1942

No. 44197. Sackett & Wilhelms Lithographing Corp	$1,636.12
No. 44340. The Georgia Marble Company	12,962.28
No. 44404. Marietta Manufacturing Company	8,693.03
No. 44566. Harnischfeger Sales Corporation	949.89



CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON OCTOBER 5, 1942

44360. Phillips Petroleum Co.
44445. Russell-Miller Milling Co., et al.
45030. Mountain Producers Corporation.
45063. Weldon Corporation.
45175. Russell-Miller Milling Co., et al.
45236. A. Wallace Chauncey.
45270. James Beckett, et al.
45273. H. A. Smith.
45285. Roderick W. Smith.
45303. Florence Jacobie, et al., Executors.
45322. Gotham Sales Company, Inc.
45337. Eastman Kodak Company.
45342. Corn Products Refining Co.
45400. The Universal Merchandise Co.
45405. Sydney M. Shoenberg.
45409. American Light & Traction Co.
45445. Twenty-First Street & Fifth Avenue Corp.
45454. United Shoe Machinery Corp.
45547. Western Fruit Express Co.
45603. Elizabeth Lyon Kidd, et al.

ON OCTOBER 5, 1942

Cong. 17777. The Atlantic National Bank.
Cong. 17788. Shelby County Trust & Banking Co.
Cong. 17798. Citizens Trust Co.
Cong. 17801. Mechanics Trust Co.
Cong. 17815. Glens Falls National Bank & Trust Co.
Cong. 17842. Citizens Savings Bank & Trust Co.

ON NOVEMBER 2, 1942

45161. New York Dock Company, et al.

ON DECEMBER 7, 1942

44570. The American Sugar Refining Co.
44571. The Franklin Sugar Refining Co.
45085. Arthur Ilfeld.
45408. Newberry Cotton Mills.
45451. American Bosch Corporation.
45690. The Commonwealth & Southern Corporation.
45701. Transamerica Corporation.

ON JANUARY 4, 1943

42545. Chicago & North Western Ry. Co.
43624. Charles M. Thompson, trustee.
44055. Whitcomb & Keller, A Corporation.
44319. Whitcomb & Keller Building Co.
44785. Valentine Laboratories, Inc.
45340. Moore-Rogan Dry Goods Company.
45580. Coca-Cola Company, etc.

Case Involving Refund Under Agricultural Adjustment Act

ON OCTOBER 6, 1942

45073. American Commercial Alcohol Corporation.

Cases Involving Infringement of Patents

ON OCTOBER 5, 1942

43858. Hazen C. Pratt.
44448. Reed Propeller Company.

Cases Pertaining to Differences in Carrying Charges and Operating Costs, Federal Farm Board

ON OCTOBER 5, 1942

Cong. 17761. Southwestern Irrigated Cotton Growers' Association.
Cong. 17762. Staple Cotton Cooperative Association, Mississippi.

Relating to Claims for Rental of Post Office Premises

ON DECEMBER 7, 1942

45327. Eastern Building Corporation.
45422. Eastern Building Corporation.
45503. Eastern Building Corporation.
45561. Eastern Building Corporation.

Relating to Requisitioning of Ships by Government

ON DECEMBER 7, 1942

42868. George A. Carden & Anderson T. Herd.

Cases Under the Act of June 25, 1938

ON OCTOBER 5, 1942

44394. Johnson & Johnson.
44408. Lindgren & Swinerton, Inc.
44446. L. A. Jones, et al.
44535. Dodson Sash & Door Co.
44536. The Council & Lewy Co.

ON NOVEMBER 2, 1942

44121. Levenson & Zenitz.
44320. The Stark Brick Company.
44549. Duffin Iron Company.

ON DECEMBER 7, 1942

44195. Intercoastal Lumber Distributors, Inc.
44345. G. and W. H. Corson, Inc.
44484. Knoxville Gray Eagle Marble Company.
44545. Nils P. Severin, et al.
44555. American-Moninger Greenhouse Corporation.

ON JANUARY 4, 1943

44284. Thomas F. Shea Construction Company.
44311. Lewis C. Isenhour, et al.
44312. Lewis C. Isenhour, et al.
44317. Lewis C. Isenhour, et al.
44318. Lewis C. Isenhour, et al.
44333. Philadelphia Uniform Company, Inc.
44365. Quaker City Iron Works, Inc.
44376. Central Engineering and Construction Company.
44382. Jackson Brick Company.
44387. Birmingham Ornamental Iron Company.
44396. United States Fidelity and Guaranty Company.
44416. Larkin Engineering Corporation.
44417. Larkin Engineering Corporation.
44423. Super-Concrete Corporation.
44424. Super-Concrete Corporation.
44425. Super-Concrete Corporation.
44426. Super-Concrete Corporation.
44427. Super-Concrete Corporation.
44440. Cress Engineering Corporation.
44472. Collins Manufacturing Company.
44473. Toney Schloss, et al., etc.
44486. Walter H. Dennison, et al.
44490. The Perfeclite Company.
44491. The Perfeclite Company.
44492. The Perfeclite Company.
44493. The Perfeclite Company.
44494. The Perfeclite Company.
44495. The Perfeclite Company.
44496. The Perfeclite Company.
44497. The Perfeclite Company.
44498. The Perfeclite Company.
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REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

January 1, 1943, to April 30, 1943, inclusive.

BROOKS-CALLAWAY COMPANY v. THE UNITED STATES

[No. 44809]

[*Ante*, p. 689; 318 U. S. 120]

Certiorari (317 U. S. 615) to review a judgment of the Court of Claims, June 1, 1942, holding:

1. Where the contract provided that the contractor should not be assessed liquidated damages for delay due to unforeseeable causes, "including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather," liquidated damages should not have been assessed for delay due to a flood, whether or not the flood could have been foreseen, since the contract lists a flood as an unforeseeable cause.
2. In a contract waiving liquidated damages for a delay on account of a flood, a flood means any high water which causes a delay.
3. In a contract waiving liquidated damages for unforeseeable causes, "including, but not restricted to" certain things named, the things named are held to be unforeseeable causes.

The judgment of the Court of Claims was *reversed* by the Supreme Court, February 1, 1943, the Supreme Court deciding:

1. Under the proviso to Article 9 of the Standard Form of Government Construction Contract, which

provides that the contractor shall not be charged with liquidated damages because of delays due to unforeseeable causes, including floods, the remission of liquidated damages is not warranted where the "flood" was not unforeseeable but was due to conditions normally to be expected.

2. The purpose of the proviso is to remove uncertainty and needless litigation by defining with some particularity the otherwise hazy area of unforeseeable events which might excuse nonperformance within the contract period.

3. The proviso in the Standard Construction Contract that the contractor shall not be charged with liquidated damages because of delays due to "unforeseeable causes" beyond contractor's control, including enumerated events, has for its purpose the protection of the contractor against the unexpected, and this purpose, as well as the grammatical sense of the proviso, both militate against holding that the listed events are always to be regarded as unforeseeable no matter what the attendant circumstances are, but the adjective "unforeseeable" must modify each event set out in the "including" phrase.

4. Under the proviso of the contract that the contractor shall not be charged with liquidated damages because of delay due to unforeseeable causes beyond contractor's control, including "floods," whether the high water which caused delays in construction of levees amounted to a "flood" or not, high water was required to be unforeseeable before remission of liquidated damages for delay was warranted.

5. In the instant suit by contractor to recover the sum deducted from the contract price as liquidated damages for delay in completion of contract, under the proviso of the Standard Government Construction Contract that contractor shall not be charged with liquidated damages because of delays due to unforeseeable causes beyond contractor's control, including floods, the Court of Claims in the first instance was required to determine whether the contractor was concluded by findings of contracting officer that high water causing delay was foreseeable; and, if not, make findings as to foreseeability.

Mr. Justice Murphy delivered the opinion of the Supreme Court.

ALICE S. KEEFE, GERTRUDE S. KEEFE, AND MARY R. KEEFE v. THE UNITED STATES

[No. 45518]

[*Ante*, p. 576; 318 U. S. —]

Estate tax; life insurance policies issued prior to passage of 1918 Revenue Act; right to change beneficiaries.

Decided October 5, 1942; petition dismissed.

Plaintiffs' petition for writ of certiorari *denied* by the Supreme Court March 1, 1943.

THE AVIATION CORPORATION v. THE UNITED STATES

[No. 45186]

[*Ante*, p. 550; 318 U. S. —]

Income tax; settlement of civil and criminal liability by compromise agreement; authority of Attorney General to effect settlement.

Decided June 1, 1942; defendant's plea in bar sustained and petition dismissed. Plaintiff's motion for new trial overruled October 5, 1942.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court March 1, 1943.

THE CHOCTAW NATION OF INDIANS, PETITIONER, v. THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS

[No. K-336]

[95 C. Cls. 192; 318 U. S. 423]

Certiorari (317 U. S. 607) to review a decision of the Court of Claims in a suit authorized by the special jurisdictional act of June 7, 1924 (43 Stat. 537), as amended (49 Stat. 1229, 1230), in which the Chickasaw Nation of Indians, plaintiff therein, claimed compensation for one-fourth inter-

est in the lands allotted to the freedmen of the Choctaw Nation from the tribal lands held in common by the Chickasaw Nation and the Choctaw Nation. The Court of Claims held that the plaintiff was entitled to recover from the defendant, the Choctaw Nation, reserving the determination of the amount of recovery for further proceedings pursuant to Rule 39a. The court did not consider what was the liability, if any, of the defendant, the United States.

The Court of Claims held:

1. That the arrangement of the "Atoka agreement," whereby the Choctaw freedmen were to be furnished their allotments at the expense of the Choctaw Nation, and not of the plaintiff, was incorporated into the "supplemental agreement" of 1902 as an obligation of the Choctaw Nation; and accordingly, the plaintiff was entitled to recover from the Choctaw Nation, defendant.

2. It is shown by the evidence adduced that the Chickasaws never adopted their freedmen, as provided under the treaty of 1866 and subsequent acts of Congress, and no allotments were made to said Chickasaw freedmen from tribal lands as therein provided; that said Chickasaw freedmen did, however, receive allotments under the "supplemental agreement" of 1902, which allotments were paid for by the United States and hence cost neither the Chickasaws nor the Choctaws anything; that the allotments to the Choctaw freedmen were made from the tribal lands owned in common by the two nations, and hence the Chickasaws contributed to said allotments their proportion, which was one-fourth, as recognized by treaties, statutes, and practice; that the Chickasaws have consistently claimed that neither set of freedmen should be provided with land at the expense of the Chickasaws, which claim was assented to by the Choctaws in the "Atoka agreement," first, and again in the application to the Court of Claims in 1909 for a modification of the decree in the *Chickasaw Freedmen case* (38 C. Cls. 558; 193 U. S. 115).

3. The rights of the freedmen of the two nations were not regarded as settled, and were not settled, by the treaty of 1866.

4. The "supplemental agreement" of 1902, which is the determining document, provided for permanent and unqualified allotments to both Choctaw and Chickasaw freedmen, but omitted the provision of the "Atoka agreement" for deduction of said allotments from allotments to members of the respective nations; and as to the

Chickasaw freedmen said "supplemental agreement" provided for determination in the Court of Claims as to whether said Chickasaw freedmen were entitled to allotments from tribal lands or whether the United States should supply at its expense said allotments to said Chickasaw freedmen.

The decision of the Court of Claims was *reversed* (March 8, 1943), the Supreme Court holding:

1. The treaty of 1866, whereby the Chickasaw Nation consented to allotments from lands owned in common by Chickasaw Nation and Choctaw Nation to Choctaw Freedmen who might be adopted in conformity with treaty requirements, was not determinative of question whether the Chickasaw Nation was entitled to compensation for its one-fourth interest in common lands allotted to the Choctaw Freedmen, where the treaty was superseded, before any allotments were made, by confirmed Atoka agreement which required the deduction of all freedmen's allotments, both Choctaw and Chickasaw, from those of the members of their respective tribes.

2. Where Chickasaw Nation by treaty consented to allotments from lands owned in common by the Chickasaw Nation and the Choctaw Nation to the Choctaw freedmen who might be adopted in conformity with treaty requirements, and the treaty was superseded by the Atoka agreement which required deduction of all freedmen's allotments, both Choctaw and Chickasaw Indians, from those of the members of their respective tribes, the subsequent 1902 agreement which omitted the deduction requirements of the Atoka agreement and contained not a word about deducting freedmen's allotments from the respective tribal shares in the common lands, superseded the deduction provision of the Atoka agreement.

3. Agreement between Chickasaw Nation and Choctaw Nation should not be given construction whirh would in effect operate as a rewriting of the agreement.

4. Treaties are construed more liberally than private agreements, and to ascertain their meaning the court may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties, and such rule is especially applicable in interpreting treaties and agreements with Indians.

5. Treaties and agreements with Indians are to be construed, so far as possible, in the sense in which the

Indians understood them, and in a spirit of generosity which recognizes the full obligation of the United States to protect the interests of a dependent people. *Tulee* v. *Washington*, 315 U. S. 681; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *Choctaw Nation* v. *United States*, 119 U. S. 1, 28.

6. Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Cf. *United States* v. *Choctaw Nation*, 179 U. S. 494; *United States* v. *Mille Lac Band of Chippewas*, 229 U. S. 498.

7. Where there was no finding as to ultimate fact whether Chickasaw and Choctaw Nations intended to agree on something different from that appearing on face of agreement, in absence of such a finding the agreement was required to be interpreted according to its unambiguous language.

8. Where Chickasaw Nation contested the right of their freedmen to allotments from lands owned in common by Chickasaw Nation and Choctaw Nation, and the United States promised to reimburse the Chickasaw Nation if there was an adverse judicial decision, but the agreement contained no promise to reimburse them for allotments to the Choctaw freedmen, a promise to reimburse the Chickasaw Nation for allotments from the common lands to the Choctaw freedmen could not be implied in view of the specific promise with regard to the Chickasaw freedmen.

9. Where the Chickasaw Nation consented by the treaty of 1866 to allotment from lands owned in common by Chickasaw Nation and Choctaw Nation to Choctaw freedmen who might be adopted in conformity with treaty requirements, but the treaty was superseded by the Atoka agreement which required deduction of all freedmen's allotments, both Choctaw and Chickasaw, from those of members of their respective tribes, and the Atoka agreement was supplemented by the 1902 agreement which omitted the deduction requirement; under the 1902 agreement allotments from the common tribal lands were to be made to the Choctaw freedmen without deducting those allotments from the Choctaw Nation's share of the lands or otherwise compensating the Chickasaw Nation for their interest in the lands so allotted.

Mr. Justice Murphy delivered the opinion of the Supreme Court.

THE CREEK NATION, PETITIONER, v. THE UNITED STATES

[No. F-369]

THE SEMINOLE NATION, PETITIONER, v. THE UNITED STATES

[No. L-88]

[*Ante*, pages 591, 723; 318 U. S. —]

Certiorari (317 U. S. 614) to review decisions of the Court of Claims, June 1, 1942, sustaining defendant's demurrers on the ground that the amended petitions of plaintiffs failed to allege any facts which would establish any liability on the part of the defendant, or to make the defendant in any way subject to suit by the plaintiffs, under the treaty of June 14, 1866, and the Act of February 28, 1902.

The decisions of the Court of Claims were affirmed April 5, 1943, the Supreme Court holding:

1. The 1866 treaty with the Creek Indians, guaranteeing the Indians quiet possession of their country and protection against hostilities by other tribes, did not obligate the United States to compensate tribes for encroachments by railroads acting under color of right.

2. The 1866 treaty with the Creek Indians, guaranteeing the Indians quiet possession of their country and protection against hostilities by other tribes, did not make the United States liable to indemnify tribes for value of land allegedly wrongfully taken by railroads, for rents and profits to railroads from use of such lands, and statutory mileage charge.

3. The guarantee of quiet possession in the 1866 treaty called for a series of legislative, administrative, and military judgments, but was not a pledge of monetary reparation.

4. The 1902 Act providing for compensation to Indians by railroads for lands taken for right of way does not render the United States liable to indemnify Indians for amounts due thereunder.

5. The statutory direction to the Secretary of the Interior to accept annual mileage charge to railroads for benefit of Indians through whose lands railroad was constructed did not make the Government an "insurer"

of collection of such charge, but merely directed the Secretary to make facilities of his office available for payment of a form of tax.

6. The 1906 Act providing that all revenues accruing to Creek and Seminole tribes should be collected by an officer appointed by the Secretary of the Interior did not make the Government a guarantor that sums owing to tribes would be paid, and did not render the Government liable for rents and profits on station reservations allegedly wrongfully taken and used by railroads.

7. The duty of the Secretary of the Interior to collect revenues and institute actions for benefit of Creek and Seminole tribes under 1906 act is discretionary, and use of the word "authorized" in the act necessarily reserves to the Secretary the right to determine his own course of action.

8. The statute giving the Creek and Seminole Indians an independent remedy for wrongs done them by railroads using Indian lands negatives intent by the Government to assume responsibility of insurer for payment of sums claimed by the Indians from railroads.

Mr. Justice Black delivered the opinion of the court.

Mr. Justice Murphy filed a dissenting opinion, in which Mr. Justice Frankfurter concurred.

Mr. Justice Rutledge did not participate in the consideration of this case.

THE CREEK NATION v. THE UNITED STATES

[No. L-137]

[*Ante*, p. 602; 318 U. S. —]

Indian claims; liability of United States for fraud or gross negligence of commission appointed under the Curtis Act and the "Original Creek Agreement" to appraise and sell town lots.

Decided June 1, 1942; petition dismissed. Plaintiff's motion for new trial overruled October 5, 1943.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court April 12, 1943.

SIOUX TRIBE OF INDIANS v. THE UNITED STATES

[No. C-531-7]

[*Ante*, p. 613; 318 U. S. —]

Indian claims; treaty of 1868; lands acquired by Government under Act of 1877; "taking"; "misappropriation"; authority of Congress.

Decided June 1, 1942; petition dismissed. Plaintiff's motion for new trial overruled October 5, 1942.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court April 19, 1943.



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actions of the defendant's officers and employees were the chief causes of the delays in completion of the contract; it is *held* that assessment of liquidated damages for such delays was improper, and plaintiff is accordingly entitled to recover. *Austin Engineering Company, Inc.*, ——.

V. Where considerable sums in excess of the amount provided in the contract were withheld as progress payments; and where final approval and payment were delayed, and the decision of the contracting officer not made for more than a year after the work was completed and accepted; and where plaintiff was not advised of said decision; it is *held* that failure to appeal such decision, of which it had no notice, does not preclude recovery by plaintiff. *Id.*

VI. Where a contract required the contractor to provide all necessary fuel, labor, etc., necessary for temporary heating, it is *held* that the contract required contractor to furnish the plant to produce the heat, in view of other provisions of the contract requiring plaintiff to protect against cold the work done. *McCloskey & Company* (No. 43859), 80.

VII. The abbreviation "etc." defined. *Id.*

VIII. A change order constitutes modification of contract. *Griffiths* v. *United States*, 74 C. Cls., 245; *Seeds & Derham* v. *United States*, 92 C. Cls. 97. *B-W Construction Company*, 92.

IX. Whether or not contracting officer was in error in rejecting article supplied, because not complying with the specifications, is a question of law, the ruling on which by the head of the department is not conclusive. *Id.*

X. Decision of contracting officer final on question of fact in absence of appeal, although head of department, on later appeal, ruled contracting officer was in error in conclusion reached. *Id.*

XI. Defendant not responsible for delays incident to deciding whether or not to adopt change suggested by plaintiff. *Id.*

XII. Defendant not responsible for delay due to furnishing inadequate equipment which it was not required to furnish, but of which plaintiff availed itself. *Id.*

CONTRACTS—Continued.

XXI. Where plaintiff entered into a contract with the War Department to furnish material and equipment and perform all necessary labor to construct and complete barracks building; and where the specifications as originally written required the installation in the kitchen of drip pans and canopies and the drawings designated drip pans and canopies as "kitchen equipment"; and where an addendum to the specifications, headed "Items Not In Contract" excluded "kitchen equipment" from the contract; it is *held* that drip pans and canopies were excluded from the contract between the parties even though the defendant did not intend to exclude them, and plaintiff, having been compelled by the contracting officer to furnish and install said articles, is entitled to recover therefor. *John McShain, Inc.*, (No. 45341), 281.

XXII. The expression "kitchen equipment," though it usually means movable equipment, is not an expression of art or trade having a meaning so fixed and universal that it cannot be varied by the context. *Id.*

XXIII. Where defendant expressly and unambiguously designated drip pans and canopies as "kitchen equipment" in the drawings, which were an important part of its invitation to bid, it had no right to expect plaintiff not to take the langauge as meaning what it said. *Id.*

XXIV. Where the dispute as to the meaning of the contract does not concern a question of fact, in that it is not merely a question of what the defendant intended or what the plaintiff intended by the use of certain words or of what the circumstances were in which such words were used; and where there is a question of what legal doctrine is applicable and what legal effect follows when parties use particular language in certain circumstances and with certain intentions, it is *held* that the decision of the contracting officer is not final, subject to no review, and the Court of Claims has jurisdiction. *Id.*

XXV. In Government contract for purchase of black earth, where nothing was said in contract about the time for payment, it is *held* that payment was due on date of delivery and acceptance. *John P. Moriarty, Inc.*, 338.

CONTRACTS—Continued.

XXVI. Running of statute of limitations not stopped by consideration of claim by administrative agency. It begins to run on date payment is due. *Id.*

XXVII. Where plaintiff entered into a contract with the Government to furnish all plant, labor and material and to perform all work required for the construction of the highway approaches to the highway bridge over the Cape Cod Canal at Bourne, Massachusetts, and for the reconstruction of the highway passing under the overpass on the north approaches to the Bourne Bridge; and where it is established that plaintiff was delayed in the performance of its work by the operations of other contractors engaged in construction of said bridge and highway; and where extensions of time were granted on account of said delays; and where upon completion of plaintiff's contract no liquidated damages were assessed and the full contract price was paid, including an allowance for extra material used; it is *held* that, while the evidence clearly shows that plaintiff was damaged by reason of delays caused by other contractors, the evidence is not sufficient to establish the extent of such damage and to fix reasonable compensation, and plaintiff is accordingly not entitled to recover. *Eastern Contracting Company*, 341.

XXVIII. It is not necessary to prove damages with mathematical exactitude but some proof is necessary to arrive at a reasonable compensation. *Id.*

XXIX. In the instant case the burden of proof was on the plaintiff and this burden has not been sustained. *Id.*

XXX. Where part, if not all, of the equipment used by the plaintiff on the contract with the defendant was also used interchangeably by plaintiff during the delay period on other contracts not with the defendant; it is *held* that it was necessary for plaintiff to prove that machinery was idle, when it was idle, and the rental value, and failing so to do, plaintiff is not entitled to recover. *Id.*

XXXI. In claiming compensation for overhead during the delay period, the evidence is insufficient to establish the proportion of overhead properly allocable to the contract in suit, and no recovery can be

CONTRACTS—Continued.

had for failure of proof. *Plumley* v. *United States*, 226 U. S. 545; *Gertner* v. *United States*, 76 C. Cls. 643, 660. *Id.*

XXXII. Where plaintiff found it cheaper to purchase material adjacent to or nearby rather than to haul material which had been furnished by the Government; and where under the contract plaintiff was not permitted to purchase any material without obtaining an order in writing from the contracting officer; and where no such order was obtained; it is *held* that with respect to this item of plaintiff's claim there has been an insufficient and improper method of proof of damages which would have been the difference between the contract price without the delays and the extra cost to which plaintiff would have been put due to double hauling and handling, and plaintiff is accordingly not entitled to recover. *Id.*

XXXIII. Where plaintiff, a Delaware corporation, entered into a contract with the Government to furnish all labor and materials and to perform all work required for the construction of an office building for the House of Representatives and where the specifications provided, with reference to the plumbing, that soil, vent, and waste pipes in all inaccessible places should be of brass and that wrought-iron pipe might be used in places which were "accessible," it is *held* that within the meaning of the specifications an "accessible" space is one from which piping could be removed and replaced without damage to the surrounding walls or partitions; and that the pipes installed within shafts or other enclosures to which access could be had through panels or similar openings were not "accessible" within the meaning of the specifications, and plaintiff is accordingly not entitled to recover. *Consolidated Engineering Co.*, 358.

XXXIV. Where, under the terms of the contract and specifications, the question of whether the pipes were in fact accessible was to be determined by the contracting officer, or his duly authorized representative, subject to appeal to the head of the department; the contracting officer's ruling, not altered on appeal, was not arbitrary nor capricious. *Id.*

CONTRACTS—Continued.

XXXV. Where the Government withheld without authority partial payments stipulated by and due under a contract, and the contractor served notice that failure to receive the sums due by a certain date would result in its refusal to proceed with the work, and the Government thereafter continued its refusal to make such payments and after contractor had stopped work, the Government undertook to terminate the contract on the grounds of alleged delay, and for other reasons, it is *held* that the plaintiff is entitled to recover the whole amount due under the contract for the work performed and the material furnished. *Brooklyn & Queens Screen Manufacturing Co.*, 532.

XXXVI. The law does not allow a defendant by its refusal to observe an obligation of a contract to place a contractor in a position where he cannot escape the forfeiture of his rights which have accrued prior to any claimed rights of the defendant to terminate the contract. *Id.*

XXXVII. The evidence of record is not sufficient to justify a finding as to profit earned to date of defendant's breach. *Id.*

XXXVIII. Following the decision in *Brooklyn & Queens Screen Manufacturing Company* v. *United States*, *ante* page 532, it is *held* that where contract was breached by defendant and it is shown that contractor was justified in refusing to complete the work under contract there was no legal liability on the part of contractor's surety to complete the work or respond in damages to the Government, and plaintiff is not entitled to recover the amount owing to contractor up to and at the time said contractor ceased work. *Anderson, et al.* 545.

XXXIX. Where there was no default or breach of the contract by the contractor, no liability attached to the surety under the terms of the bond, and no subrogation to the rights of the principal. *Prairie State National Bank* v. *United States*, 164 U. S. 227, and similar cases cited. A surety is not entitled to subrogation until he has paid the debt, and, secondly, a volunteer is not so entitled. *The Illinois Surety Co.* v. *Mitchell*, 177 Ky. 367 (197 S. W. 844). *Id.*

CONTRACTS—Continued.

XL. Where plaintiff was awarded contract for clearing site of Government building; and where contract required plaintiff to pay agreed amount for all material removed and to post performance bond, all of which plaintiff did; it is *held* that under terms of said contract defendant was obligated to use reasonable care to preserve such material in good condition until plaintiff's bond was approved and notice to proceed given, and since defendant failed to do so plaintiff is entitled to recover for damages to such material incurred between the time plaintiff's bid was accepted and the time possession was given to plaintiff. *Harris Wrecking Company*, 407.

XLI. Where plaintiff entered into a contract dated October 13, 1932, with the defendant under the terms of which, including the drawings and specifications constituting a part thereof, plaintiff agreed to excavate for and construct a post office building at Gallup, New Mexico, within a given time limit for a lump sum price; and where under the terms of the specifications said price was based upon excavation other than rock; and where the contract and specifications required plaintiff to excavate whatever material that should be encountered with provision for adjustment in price for rock, and plaintiff made no preliminary investigation as to the presence rock; and where rock was encountered in the progress of excavation; necessitating a change of method and equipment, all of which, as it was handled by plaintiff, resulted in delay; it is *held* that in the circumstances disclosed by the record the defendant did not bring about nor cause any unreasonable delay to plaintiff in connection with the rock excavation work and plaintiff is not entitled to recover damages for delay. *Union Engineering Co., Ltd.*, 424.

XLII. Where, upon representations made by the plaintiff with respect to the increased cost of excavation by reason of the presence of rock, the supervising architect after proper investigation and report by the construction engineer, granted an extension of time and an increase in price, which was paid; it is *held* that the record does not disclose that the construction engineer acted unreasonably or arbitrarily in the circumstances. *Id.*

CONTRACTS—Continued.

XLIII. Where plaintiff furnished the construction engineer with samples of aggregate which were approved; and where, thereafter, upon delivery shipments of aggregate upon examination and test were found not to conform to requirements of the specifications; and where, upon protest, modifications in the specifications were made by defendant's representatives, and plaintiff was also granted an extension of time on account of the gravel controversy; it is *held* that the tests were made in accordance with the normal, accepted, and proper method, and the action of defendant's representatives were not unreasonable nor arbitrary. *Id.*

XLIV. Where upon proper report showing the balance due under the contract, including additions from time to time, and extensions granted, and recommending that liquidated damages be waived, in accordance with the Act of June 6, 1902, such report was approved by the Secretary of the Treasury, and liquidated damages were waived, and the balance shown to be due was paid; it is *held* that the plaintiff is not entitled to recover damages for delay. *Id.*

XLV. Where plaintiffs entered into a contract to furnish all materials and labor, and to perform all necessary work for the construction of two Government buildings, the drawings and specifications being made a part of the contract; and where a subcontract for all steel and iron to be used in one of the buildings called for the installation of steel guards or casings around all free standing columns contemplated by the construction contract between plaintiffs and defendant; and where, in the small scale drawings 576 free standing columns were indicated, but only 44 such columns were shown in the detail drawings; it is *held* that the contract, including the drawings, schedules, and specifications, all of which were available to the subcontractor when its estimates were prepared, called for the furnishing of 532 steel column casings, in accordance with the decision of the supervising engineer, in addition to the 44 which the subcontractor had contemplated in submitting its bid, and the plaintiffs are accordingly not entitled to recover. *John McShain, Inc.*, 493.

INDIAN CLAIMS—Continued.

ever ambiguity may have been discerned in the treaty in which the alleged ambiguity is contained. *Id.*

IV. There is nothing in the doctrine of construing ambiguous language against the party who drafted the instrument, or in the doctrine of construing treaties between the United States and Indians favorably to the Indians, which would justify the Court of Claims in placing a meaning upon an instrument contrary to that which, for some 80 years, the parties to the instrument had themselves placed upon it. *Id.*

V. The Act of February 12, 1929 (45 Stat. 1164), authorizing payment of "simple interest" at 4 percent on trust funds, was not intended to apply to trust funds which were composed of and created by the deposit of interest on other funds. Plaintiff not entitled to recover interest on interest trust funds. Such interest would be compound interest. *Menominee Tribe*, 158.

VI. Where, under the Act of March 2, 1889, embodying an agreement between the parties to the instant suit, the validity of which is conceded by said parties, all money accruing from the disposal of land therein ceded by the plaintiff tribe was to be paid into the United States Treasury to create a fund to be maintained for the Sioux or applied to specific purposes for their benefit; it is *held* that the defendant could perform its duty under the agreement as well by expending the money for the plaintiff as by holding it for plaintiff, and plaintiff is not entitled to recover until and unless it is shown that the defendant has failed to set up said fund, or, having set it up, has failed to use it in accordance with said agreement. *Sioux Tribe (No. C-531-11)*, 391.

VII. Where in the interpretation by certain Government agencies of the treaty of April 29, 1868 (15 Stat. 635), diminishing the Sioux reservation and fixing the western boundary of said reservation at meridian 104° west of Greenwich, it was assumed by such Government agencies that said 104° west of Greenwich was identical with 27° west of Washington fixed as the western boundary of the Dakota territory by the statute of 1864 (13 Stat. 85) establishing the territory of Montana and by the subsequent statute of July

INDIAN CLAIMS—Continued.

in the surveying, platting, scheduling, and appraising of the lots had been guilty of fraud or gross negligence. *Chippewa Indians of Minnesota* v. *United States*, 91 C. Cls. 97; *Ross* v. *Stewart*, 227 U. S. 530, 535; *Johnson* v. *Riddle*, 240 U. S. 467, 474. *Creek Nation* (No. L–137), 602.

XXIV. It was also *held* that the correctness of the findings of these commissions was to be presumed and that fraud or gross mistake could only be established by clear and convincing evidence, especially in view of the long lapse of time since the appraisals in the bringing of this suit. *Id.*

XXV. Mere disparity between appraisal and subsequent sale price or amount of subsequent assessment not sufficient to show fraud or gross mistake, especially where conditions are not shown to have been the same. *Id.*

XXVI. Where, under article 2 of the treaty of April 29, 1868, with plaintiff tribe (15 Stat. 635), the Black Hills section of South Dakota, here involved, comprising about 7,345,167 acres, was included in the area set apart for the absolute and undisturbed use and occupation of the tribe, and, in addition, certain hunting privileges were granted by other articles of said treaty with reference to other lands; and where, under said treaty, the Government assumed an obligation, besides others, to provide food for the subsistence of all the members of said tribe for a period of four years; and where this obligation was fulfilled by the necessary annual appropriations; and where the Government, through an act of Congress in 1877, acquired said lands without the consent of three-fourths of the male adult Indians having been first obtained, as provided in article 12 of said treaty; and where, under the provisions of said act of 1877, the Government assumed an obligation to continue to appropriate, and has since appropriated annually, such sums as should be necessary for the subsistence of said tribe "until the Indians are able to support themselves" in return for the Black Hills and hunting rights acquired; and also added 900,000 acres of grazing land to the permanent reservation:

INDIAN CLAIMS—Continued.

Held: A study of the facts and circumstances of the instant case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, and the application thereof to the provisions of the jurisdictional act (41 Stat. 738) in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in its dealings with said Indians leads to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a "taking" or "for the misappropriation of any lands of said tribe." *Lone Wolf* v. *Hitchcock*, 187 U. S. 552, cited. *Sioux Tribe* (No. C-531-7), 613.

XXVII. Where Congress possessed the authority to take the action of which the plaintiff complains in the instant case, and where the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and to be just to both parties; it is *held* that there was no misappropriation of the land by the Government and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of this legislation or the wisdom thereof. *Id.*

XXVIII. The jurisdiction of the court must be found within the terms of the jurisdictional act, which merely provides a forum for the adjudication of the claim according to applicable legal principles. *Price* v. *United States and Osage Indians*, 174 U. S. 373, 375, and other cases cited. *Id.*

XXIX. Suit may not be maintained against the United States in any case on a claim not clearly within the terms of the statute by which it consents to be sued. *United States* v. *Michel*, 282 U. S. 656, 659, cited. *Id.*

XXX. Special jurisdictional acts are strictly construed and clear grant of authority must be found in the act. *Blackfeather* v. *United States*, 190 U. S. 368, 373–376, and other cases cited. *Id.*

XXXI. Only where the consent "to suit" *without qualification* has been given in respect to suits against Government owned or controlled corporations has the act granting such consent been

INDIAN CLAIMS—Continued.

XXXV. The claim contemplated by the jurisdictional act must be one which arises under and is sustained by the treaty as against the action taken by Congress in the act of 1877; and where Congress had the authority legally to do what it did; and where the action taken and the results of such action were pursuant to and based upon what Congress deemed in the circumstances to be for the best interests of the Indians; it is *held* that the plaintiffs have no legal right, under the treaty or the terms of the jurisdictional act, to maintain a claim for more money, plus the addition of interest from 1877, in addition to the amount which Congress stipulated in the act of 1877 should be paid and which has been and is being paid, and will continue to be paid for the lands acquired, until the Indians, with the assistance of the Government, become self-supporting. *Id.*

XXXVI. There was no misappropriation of the land by the Government, and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of said legislation or the wisdom thereof. *Id.*

XXXVII. The claim in the instant suit is moral, rather than legal, and before the court can adjudicate or render judgment upon it, the court must have from Congress clear authority to do so, which authority, under the cases cited, was not conferred by the jurisdictional act. *Price* v. *United States and Osage Indians*, 174 U. S. 373, 375, cited. *Id.*

XXXVIII. In transactions between private parties, one party to a proposed transaction cannot legally fix the terms or consideration, and force the acceptance of the other party, but this legal proposition does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom, or authority of Congress, unless Congress has clearly granted to the Indians the right to do so. *Id.*

SPECIAL JURISDICTIONAL ACT—Continued.

lease, or any statute of limitation, to hear and determine the claim of the Mack Copper Company," (63 C. Cls. 562) it is *held* that it was the intention of Congress that the Court should (1) determine the amount of damages and waste that was committed during the period of use and occupancy by the defendant and (2) that the Court should consider anew the validity of the lease and consequently the amount that should have been paid for use and occupancy by the defendant. *Mack Copper Company*, 451.

II. Where lease was not formally authorized by the board of directors of plaintiff corporation but was signed by its president under the corporation seal, was regular in form and was accepted as such; and where no proper notice of repudiation was ever given to defendant, and where said lease was acknowledged in an agreement dated March 3, 1920, between plaintiff and defendant; and was admitted by plaintiff in its pleadings in a suit filed in the United States District Court; it is *held* that the plaintiff by conduct, letters, instruments and documents affirmatively ratified said lease and said lease was therefore valid. *Id.*

III. Where under a previous decision (63 C. Cls. 562) the Court held that there were certain items connected with the use and occupation of the property, in the nature of waste, for which the defendant was not liable, on the theory that the defendant did not hold the property under lease, and that therefore there could arise no implied covenant under which relief could be given within the limited jurisdiction of the Court of Claims; and where in the instant case it has been established by evidence that the property was taken and held under lease and that said lease was valid; it is *held* that for certain items, enumerated in the findings, plaintiff is entitled to just compensation in the sum of $45,300. *Id.*

IV. According to the terms of the lease (which in a previous decision of the Court of Claims, 63 C. Cls. 562, was held not to be valid) the plaintiff should have been allowed only nominal pay for use and occupancy instead of the $79,500 which was allowed in the previous decision; and on its counterclaim the defendant is accordingly entitled to recover $79,499. *Id.*

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TAXES—Continued.

INCOME TAX—Continued.

ganization and hence nontaxable under the provisions of section 112 (g) of the Revenue Act of 1928 (45 Stat. 791). *Coca-Cola Company*, 241.

IV. (4) Where plaintiff, a Delaware Corporation, was the owner of all of the outstanding capital stock of the Coca-Cola Company of Canada, Ltd., and was also the owner of all of the outstanding capital stock of the Rohawa Company, also a Delaware corporation; and where, in order to supply the Rohawa Company with funds for the purposes for which said Rohawa Company was organized, the Canadian Company transferred to the Rohawa Company in 1931 certain assets in return for the issuance to said Canadian Company of 30 shares of new stock of the Rohawa Company; and where immediately thereupon the Canadian Company distributed the 30 shares of Rohawa stock to plaintiff without the surrender by plaintiff of any of the stock which plaintiff owned in the Canadian Company; and where all of these transactions were carried out in pursuance of a plan evolved by plaintiff which controlled all of the corporations in question, and thereafter all of the corporations remained in existence and continued to carry on their normal functions as theretofore; it is *held* that such transaction comes clearly within the definition of a "reorganization" as set out in section 112 (i) of the Revenue Act of 1928 (45 Stat. 791), and plaintiff is entitled to recover. *Id.*

V. (5) Where a transaction is carried out in a particular manner admittedly to minimize or avoid tax, such transaction should be scrutinized closely in order to determine whether the statute has been strictly complied with. *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States*, 254 U. S. 141; *Gregory* v. *Helvering*, 293 U. S. 465; *Chisholm* v. *Commissioner*, 79 Fed. (2d) 14. The transaction must be real and "undertaken for reasons germane to the conduct of the venture in hand." *Id.*

VI. (6) In the instant case it is *held* that the underlying purpose for the transaction in question was of a genuine business nature; none of the corporations involved was a "dummy" and the purpose accomplished, which was the transfer of funds, was nothing new. *Id.*

TAXES—Continued.

INCOME TAX—Continued.

VII. (7) Taxpayers are not required to carry out their transactions in a way that will produce the most tax for the Government. *Gregory* v. *Helvering, supra. Id.*

VIII. (8) Where transaction was carried out by corporate taxpayer in particular manner in order to make its taxes as low as possible; and where such transaction was real and not a sham; it is *held* that such purpose was not fatal to taxpayer's claim for refund of alleged overpayment. *Id.*

IX. (9) Where the provision of the 1928 Revenue Act, which exempted stock distributed pursuant to plan of reorganization in computing gain of stockholder, was eliminated in later tax statutes; it is *held* that such elimination did not affect a transaction which was completed while 1928 Act was still in effect. *Id.*

X. (10) In the enactment of section 112 (g) of the Revenue Act of 1928 it was the purpose of Congress to permit through reorganization the shifting of funds or assets from one *bona fide* corporation to another under the same control in order to meet changing conditions and needs which might make such transfer desirable. *Id.*

XI. (11) Where a partner sells his interest in a partnership business; it is *held* that the holding period for the pupose of applying the percentage rate specified in section 117 of the Revenue Act of 1936 (Title 26, U. S. Code, section 873), is to be measured from the date or dates of acquisition by the partnership of the specific partnership assets which the partnership owned at the date of sale of the "partner's interest," and plaintiffs are not entiled to recover. *City Bank Farmers Trust* (No. 45470), 310.

XII. (12) For Federal tax purposes, in the absence of a specific statutory provision to the contrary, a partnership is treated as an association of individuals who are vested with an interest in the specific property of the partnership. *Craik* v. *United States*, 90 C. Cls. 345. *Id.*

XIII. (13) State law may control only when the Federal taxing act, by express language, or necessary implication, makes its own operation dependent upon State law. *Burnet* v. *Harmel*, 287 U. S. 103, 110; *Lyeth* v. *Hoey*, 305 U. S. 188, 191–194. *Id.*

TAXES—Continued.

INCOME TAX—Continued.

Internal Revenue declined to approve this basis for depreciation purposes and instead computed and allowed the depreciation deductions on the basis of cost of such assets to the liquidated subsidiary corporation; it is *held* that plaintiff is entitled to recover. *Ford Motor Company (Delaware)*, 370.

XIX. (19) Under the provisions of section 202 of the Revenue Act of 1918, when property is exchanged for other property, the property so received shall, for the purpose of determining gain or loss, be treated as the equivalent of cash to the amount of its fair market value. *Id.*

XX. (20) Where plaintiff liquidated a wholly-owned subsidiary, and acquired all the assets of such subsidiary in exchange for the surrender of all of the capital stock of such subsidiary, the transaction gave rise to a taxable profit or a deductible loss (*Burnet* v. *Aluminum Goods Company*, 287 U. S. 544), and plaintiff was entitled to use as the basis for its deductions for depreciation for the years involved the actual fair market value of the depreciable assets as of the date of acquisition. *Heiner* v. *Tindle*, 276 U. S. 582, and other cases cited. *Id.*

XXI. (21) Prior to the date of acquisition of such depreciable assets plaintiff had no ownership interest in the properties of its subsidiary (*Klein* v. *Board of Supervisors*, 282 U. S. 19, 24); on and after that date plaintiff owned outright said assets, and then became entitled to depreciate them for tax purposes on the basis of their actual value as of the date of acquisition. *Id.*

XXII. (22) Although affiliated, plaintiff and its subsidiaries were at all times separate taxpayers. *Swift & Co.* v. *The United States*, 69 C. Cls. 171. *Id.*

XXIII. (23) Under the consolidated returns provisions of the 1918 Revenue Act (Section 240), a parent corporation was given no ownership interest in the assets of a subsidiary. *Id.*

XXIV. (24) Section 331 of the Revenue Act of 1918 related only to the determination of "invested capital" for the purpose of the excess profits tax credit against net income, and had no effect upon the determination of net income; and said section ceased to have any effect when the excess prof-

TAXES—Continued.

INCOME TAX—Continued.

XXXIII. (33) Where plaintiff, a corporation lessee of coal lands from which it mined coal, paying to the lessor a royalty per ton of coal mined, was under the Treasury Regulations then in force not permitted to deduct from its income for tax purposes for the years 1913–1917, inclusive, depletion resulting from its removal of coal; and where during the years 1918–1933, inclusive, the Commissioner of Internal Revenue in applying the formula for allowable depletion under the applicable statutes treated as if it were still in place the coal actually mined by plaintiff in 1913–1917, inclusive, but for which no depletion allowance had been made; and where in 1934 and in 1935, the Commissioner changed his practice with reference to plaintiff's operation and reduced the value of the intact coal, which had up until that time been annually reduced by the value of the number of tons taken out in each of the years 1918–1933, inclusive, by the additional amount representing the value of the number of tons mined in the years 1913–1917, inclusive, thus decreasing the depletion unit per ton and increasing the tax due by plaintiff; it is *held* that plaintiff is not entitled to recover under the equitable doctrine of recoupment. *Josephine V. Hall* v. *United States*, 95 C. Cls. 539 cited; *Stone* v. *White*, 301 U. S. 532, distinguished. *Lynchburg Coal and Coke Company*, 517.

XXXIV. (34) Under the provisions of the 1934 Revenue Act the Commissioner was required to make deductions for depletion previously allowed but not less than the amount allowable under prior income-tax laws; and since the 1913–1917 erroneously disallowed depletion was allowable, the Commissioner was required to deduct it. *Id.*

XXXV. (35) Plaintiff's right to sue directly for a refund of the 1913–1917 taxes is long since barred by the statute of limitations. *Id.*

XXXVI. (36) The Commissioner's refusal to credit plaintiff in 1934 and 1935 with overpayments made in the years 1913–1917, inclusive, is authorized by sections 608 and 609 of the Revenue Act of 1928. *Id.*

WORDS AND PHRASES











